No. 697

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OSCAR L. GRANT, et al.,

Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and

DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, Intervenor, and

ADAMS PRODUCERS COOPERATIVE, INC., et al., Intervenors, and

METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC., Intervenors,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.,
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
Harrisburg, Pa.
of Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

OSCAR L. GRANT, *et al.*,

Petitioners,

vs.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Oscar L. Grant, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on December 8, 1955 in the above entitled cause (Nos. 12,478 and 12,498 below).

Opinions Below

The opinion of the United States District Court for the District of Columbia is printed in Vol. I Jt. App. 175, and is unreported; the Supplemental opinion of said court is printed in Vol. I Jt. App. 219, and is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in the Appendix hereto, p. 26, and is unreported.

Jurisdiction

The judgment of the United States Court of Appeals f the District of Columbia Circuit was entered December 1955. The jurisdiction of this Court is invoked und Title 28, United States Code, Section 1254.

Questions Presented

The Agricultural Marketing Agreement Act of 19 authorizes the Secretary of Agriculture to issue orders re ulating the handling of milk, which shall contain one more of the terms and conditions specified in Section 8c(including payment to producers and associations of pr ducers of uniform prices for their milk, subject only specified adjustments, and, except as provided in subs tion (7), no others. Subsection (7) (D) authorizes all su orders to contain terms and conditions "incidental to, a not inconsistent with, the terms and conditions specifi in subsections (5), (6), and (7) and necessary to effectu the other provisions of such order." The questions pr sented are:

1. Does said Subsection (7)(D) authorize the Secreta to require that a portion of the amounts paid by handle (i.e., purchasers) as the price for milk delivered to the by producers (including non-members of cooperative ass ciations) shall be deducted from such amounts and ther upon paid, not to all producers of such milk, but to certa cooperative associations (or federations thereof), as pr vided in Sec. 927.76 of Order No. 27 regulating the ha dling of milk in the New York area?

2. Does any other provision of the Act authorize t Secretary to require that any portion of the amounts pa by handlers as the price for milk delivered to them by pr ducers (including non-members of cooperative association shall be deducted from such amounts and thereupon pai not to all producers of such milk, but to certain cooperati associations (or federations thereof), as provided in S 927.76 of Order No. 27?

Statute and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 601 et seq. Provisions essential to this case are set forth in the Appendix hereto, p. 1.

The administrative order involved herein is Order No. 27, regulating the handling of milk in the New York Metropolitan Marketing Area, issued by the Secretary of Agriculture of the United States [7 C. F. R. Sec. 927.1 *et seq.* (1952), as amended, 7 C. F. R. Sec. 927.76 (Supp. 1955)]. The particular provisions directly involved in this case are set forth as follows: The pertinent provisions of the 1938 Order appear in the Appendix hereto, p. 7; the 1953 Amendment appears in the said Appendix at p. 12.

Statement of the Case

The petitioners are dairy farmers or milk producers, who, immediately after the decision of this Court in *Brannan* v. *Stark*, 342 U. S. 451, in March 1952, instituted this class action to enjoin the Secretary of Agriculture from enforcing certain provisions of Order No. 27, regulating the handling of milk in the New York Metropolitan Milk Marketing Area, very similar to the provisions of the Boston Order No. 4 invalidated in that case. Under the challenged provisions, deductions are made from petitioners' milk prices, and the sums so deducted monthly are thereupon paid out to certain cooperative associations of producers. In the year (1951) prior to commencement of this action, $1,273,109 had been paid out to about 73 cooperatives,* of which sum over $400,000 was deducted

*Larger sums are now (under the 1953 Amendment) prescribed for payment instead to only 2 cooperatives and 2 federations. See note 7 below, p. 10.

from the price of milk produced by approximately 17,500 individual producers who are not members of qualified cooperatives. The petitioners and others similarly situated are not members of such cooperatives, and therefore complain of such deductions and payments.

The challenged provisions of Order No. 27 became effective September 1938. These provisions, with minor amendments, remained substantially the same until December 16, 1953. The 1938 provisions (Appendix, p. 10) authorized deductions from producer prices, for payments to cooperatives sought by them for their customary activities in selling milk subject to the regulatory program, including presenting testimony at hearings and certain activities claimed to be related to milk utilization. The latter activities had been chiefly relied upon by the Secretary in support of the provisions of the Boston order held invalid in the *Stark* case.

In 1953 the Secretary held a hearing, as a result of which the 1938 provision for payments was deleted and superseded by an amendment effective December 16, 1953 (Appendix, p. 12). The 1953 Amendment adopted six conditions under which cooperatives are paid for customary activities in connection with the regulatory program, such as participating in hearings, studying marketing problems and conducting an educational program respecting the milk order.

The District Court for the District of Columbia granted a preliminary injunction April 7, 1952, under which the challenged deductions were continued and paid out to cooperatives, except that (generally stated) sufficient monies were held in escrow to protect petitioners and other nonmembers. The equity jurisdiction of the District Court was invoked under the Act of June 25, 1948, c. 646, 62 Stat. 931; 28 U. S. C. Sec. 1337. The complaint and supplemental complaint was tried on February 24, 1954, before District

Judge Casper Platt, who filed his opinion on July 8, 1954, denying the injunction and dismissing the action; on September 23, 1954, he issued his final judgment to that effect, and also ordered a partial stay with respect to operation of both the 1938 and 1953 provisions, pending appeal.

The case, No. 12,478, was argued upon appeal (and cross-appeal, No. 12,498, with respect to the stay) in the Court of Appeals for the District of Columbia Circuit, on May 5, 1955, before a panel of that court entirely different from that which decided *Brannan* v. *Stark*, 185 F. (2d) 871, affirmed 342 U. S. 451. On December 8, 1955, the court below affirmed the judgment and vacated the partial stay, Circuit Judge E. Barrett Prettyman dissenting. On January 10, 1956, the court below entered an order staying the mandate and continuing in effect such partial stay (under which over $2,500,000 has accrued in escrow since the inception of this action in 1952, drawing interest) until and including February 6, 1956, pending the filing of this petition. On February 2, a further stay was ordered to and including February 16, 1956 (Appendix, p. 41).

REASONS FOR GRANTING THE WRIT

I. The decision of the court below conflicts with applicable decisions of this Court.

The decision of the court below is in direct conflict with *Brannan, et al.* v. *Stark, et al.*, 342 U. S. 451.

The facts in this case and the *Stark* case are virtually the same. Both are actions in which milk producers, not members of cooperative associations receiving the challenged payments, filed similar injunction complaints to contest the authority of the Secretary to include certain provisions in milk marketing orders. Both cases are identical with respect to the cooperative activities or services ad-

vanced in support of the challenged payments; and are very similar, with respect to the order provisions describing the activities for which cooperatives qualify to receive the challenged payments.

In his dissenting opinion filed in the court below, Circuit Judge Prettyman stated that "it seems clear to me that the Supreme Court [in *Stark*] held the same conditions present in our case, or certainly very similar conditions, not to justify deductions to the cooperatives." In the *Stark* case, this Court found the provisions of the New York order (here challenged) to be "of the general nature of those in question" there (Footnote 19, at 466), and "providing for comparable payments" (Footnote 12, at 461).

The holding of this Court in *Stark* is directly contrary to the holding below. In *Stark*, this Court held that identical deductions, and the payments thereof to cooperatives under similar conditions, "are not 'incidental' to the specified terms" of the Act * * * and that they "are inconsistent therewith" (463); and, therefore, that the Court "need not determine whether they are 'necessary'" * * * (464). Accordingly, this Court held that the challenged provisions are not authorized by the auxiliary powers clause of the Act, Sec. 8c (7)(D). In direct conflict, the court below held that the terms challenged herein are "incidental to, not inconsistent with, and necessary * * *"; Appendix, p. 33.

After the pertinent provisions of the Boston order were analyzed, in the light of the statutory language this Court concluded in the *Stark* case, at 466: "We hold that they are not authorized by the Act." Section 8c(5) of the Act enumerates with particularity the terms and conditions that may be included in milk orders and limits such orders to those terms and, except as provided in Subsection (7), "no others". In considering this section, this Court held (462) "that Section 8c(5) does not authorize the provisions challenged here." Subsection (7)(D) permits pro-

visions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6) and (7) and necessary to effectuate the other provisions of such Order." This is the subsection principally relied upon by the Secretary in the *Stark* case, and by the court below in the instant case. In *Stark*, this was termed an "omnibus subsection" permitting only "auxiliary provisions" (462). In answer to the Secretary's claim that the cooperative payment provisions were of such basic importance to the milk market program, this Court said (463): "We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tailpipe." But this is exactly what the decision of the court below does.

The conflict concerns the fundamental question of whether delegation of power to the Secretary of Agriculture under the Act of 1937 depends upon the intent of Congress as expressed in said Act, or whether it depends upon the views of the Secretary as to the desirability of his action. In *Stark*, this Court searched for and determined that which "Congress intended", using this or a similar phrase no less than five times (at 463, 465, 466). But the court below made no such search or determination, relying *exclusively* on the Secretary's findings, including the finding that his action was "reasonably necessary to accomplish the purposes of the statute through the method adopted" (Appendix, p. 34). In its basic concept that by reason of the Secretary's findings the Congressional intent need not be ascertained, the decision below is in direct conflict with *Stark* (and other decisions of this Court, noted below). This is the more clear since the decision in *Stark* was based not upon any lack of agency findings there, but solely upon the absence of statutory authority.

The majority opinion below, although stating that "there is some language in *Stark* which might seem opposed to our decision", attempted to distinguish that case on grounds which only serve to sharpen the conflict therewith:

1. The court below stated that the qualifying conditions in the Boston Order "showed on their face that the services to be performed by the cooperatives were designed to aid only their members" (Appendix, p. 34). The one clause of the 1953 Amendment herein [Condition (5)[1] of Sec. 927.76 (e)] which was used as an "example" by the court below does show on its face that it appears designed to aid both members and non-members by keeping them informed. However, the Boston Order also contained a requirement[2] which was urged as indicating benefits to non-members, i.e., activities incident to the operation of the uniform pricing program; and it was there urged that cooperative activities kept non-members informed of the program. But such requirement of the Boston Order was disposed of by this Court in the *Stark* case, where it was held that "even if this requirement comprehends a service to non-member producers substantial enough to be significant" (at 460), such activities generally "amount to no more than playing the part of an alert, intelligent, organized participant in the market * * * and maintaining the cooperative organizations by promotional work to show

[1] Condition (5) is only in the 1953 Amendments; Appendix, p. 20; quoted in text of opinion below, Appendix, pp. 35-36.

[2] This requirement, Condition (7) in Boston Order No. 4 stated: "(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers." Services which shaped and interpreted "to producers" the operation of the uniform pricing plan in Boston included the following, described by the Secretary in *Stark* (Secretary's Brief in Court of Appeals, p. 22): "Educational meetings are held at which non-members, as well as members, may attend. Radio programs are regularly maintained by some of the co-operatives and in this manner non-members, as well as members, are kept informed as to current market conditions. Some co-operatives publish and issue to their members periodicals which, while circulation is mainly among members of these co-operatives, frequently contain articles urging and assisting producers to market milk so that their collective efforts will benefit all interests in the market." There is no finding, and no suggestion, that under the New York order cooperative publications are not subscribed to mainly by members.

farmers the benefits of cooperation and by educational work among members" (462).

The other five requirements [3] of the 1953 Amendment do not, in any instance, show that they refer to any services to be performed for non-members. In this regard, they are exactly the same as the first six conditions [4] in the Boston order involved in *Stark,* wherein this Court held (at 459): "But none of these shows any indication that the activity it prescribes will benefit non-members * * *."

As for the 1938 provision, only one of the four qualifications for payment refers on its face to "all producers"; Appendix, p. 10. Here again, as in *Stark,* most qualifications do not recite any services to be performed for non-members.

2. The court below stated (Appendix, p. 36) that "the Supreme Court did not have before it in the *Stark* case detailed findings of the Secretary and the District Court to the effect that the services performed by cooperatives are marketwide and are of great benefit to non-members as well as members." However, *Stark* cannot be thus differentiated, for the following reasons:

(a) In connection with the 1938 provision of Order No. 27 the Secretary made no findings whatever, except that he merely adopted the statutory phrase applicable generally to the order, that it "will tend to effectuate the declared policy of the Act"; original 1938 provision, Vol. II Jt. App. 683, 3 F. R. 1945, as amended in 1940, Vol. II Jt. App. 689; and as amended in 1941, Vol. III Jt. App. 1244. See the statutory phrasing of Sec. 8c(4) and Sec. 8c(18); Appendix, pp. 1 and 5.

The court below erroneously treated, and permitted the Secretary to apply, his findings of August 17, 1953 (Vol. I

[3] Sec. 927.76(e) of 1953 Amendment, Appendix, p. 19; quoted in opinion below, Appendix, p. 36 (note 9).

[4] Quoted in opinion below, Appendix, p. 34 (note 8).

Jt. App. 107; 18 F. R. 4998) retroactively to 1938.[5] This, notwithstanding that these 1953 findings were used as the basis for deleting[6] and superseding this very (1938) provision, and for adoption of the 1953 Amendment, effective December 16, 1953, with much different provisions.[7] The 1938 order, during virtually its entire existence, was without supporting findings.

(b) The Secretary's findings that activities of cooperatives were "marketwide" services of "benefit to non-members", made in support of the 1953 Amendment in this case, do not distinguish this case from the *Stark* case. There also, the Supreme Court said that "it may be conceded that these activities are indirectly beneficial to the whole market" (342 U. S. at 460); "they may sometimes incidentally benefit the whole market" (at 462); the services are "incidentally helpful to other producers" (at 464). Thus, the *Stark* case did not turn on any lack of findings, on the facts deemed so critical below; rather, notwithstanding these very facts this Court found a lack of statutory authority for provisions such as in issue here. Nothing in the findings of the Secretary, or in the courts below, establishes that

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[5] Sec. 927.0 of the 1953 Amendment purports to remedy the defect by applying the 1953 findings back to "the issuance of the aforesaid order and each of the previously issued amendments thereto"; Appendix hereto, p. 12.

[6] The Official Committee of Experts, appointed by the Department, presented its report at the 1953 hearing and strongly urged deletion of the 1938 provision as "impractical and ineffective", Vol. V, Jt. App. 2173, 2175, and "not an appropriate means" of directing milk utilization, etc. (id., 2216). Accordingly, the Secretary found (Vol. I, Jt. App. 116, lines 3 to 10) that it caused "difficulty" and "unnecessary costs" * * * "without actually achieving a higher net utilization * * *."

[7] Essential differences are (1) listing certain "order and education" activities, Sec. 927.76(e), and eliminating the supposed surplus disposal or milk utilization activity, as conditions qualifying for payments; (2) reduction of qualifying cooperatives from 70-odd to only the 2 with over 4,000 members; (3) permitting the 2 federations of cooperatives to qualify.

the benefit to non-members herein is other than indirect and incidental to the normal and customary activity of efficient cooperatives in general, engaged in servicing their own members and promoting their own interests, at member expense, in all major milk markets (whether or not under regulation).[8]

(c) The Boston order, like the 1953 provision herein, did have supporting findings as to "necessity": 6 F. R. 3762, supplemented shortly thereafter in 1943, 9 F. R. 3057, 3059, by more detailed findings that cooperatives present "evidence at hearings concerning the needs of producers" and "constructive amendments", and assume "responsibility for a reserve of milk * * * essential in a market" * * * "considered necessary" * * * etc. Except that the Secretary's 1953 findings on the New York order are laden with argument and evidence, they rest upon the same marketwide nature and "necessity" as the findings made under the Boston order. This is another respect in which the facts of the two cases are indistinguishable.

3. The court below stated (Appendix, p. 37) "particular note must be taken of the difference between the Boston Order and the New York Order regarding the services to be performed by cooperatives in securing outlets for surplus milk and in disposing of milk so as to bring the highest net return to the fund." However, in *Stark*, this Court disposed of such services in Boston (there chiefly relied on as justifying the payment) on three grounds (at 460-461): (1) that such activities are merely "indirectly beneficial to the whole market"; (2) that "proprietary handlers also carry on activities of this kind"; (3) that "the associations are in no way required to handle any of the surplus milk

[8] The Official Committee of Experts listed 25 markets as typical of such customary cooperative activity (Vol. V, Jt. App. 2167-68). The Secretary found that activities herein commenced in New York in 1916 (Vol. I, Jt. App. 112), as more fully developed by said Committee in Vol. V, Jt. App. 2141-44.

of non-members." All three grounds[9] are present in t instant case (under both the 1938 and the 1953 provision but the court below disregarded them.

It was only as a fourth ground, pertaining to its conc sion that milk disposal activities did not support the co tested Boston payments, that the text of this Court's opi on pointed out "there is no requirement in the Order * * even with respect to surplus milk of their members." Fo note 12 of *Stark* thereupon contrasted certain language[10]

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[9] As for the first ground, it is undisputed here that in New Yo Boston and elsewhere cooperatives acquired such plants "mainly strengthen their bargaining position" (Official Committee of Expe Vol. V, Jt. App. 2142). As for the second ground, the Secret here found that "similar plants * * * are operated by proprieta handlers", although adding the immaterial (shown below, p. note 12) allegation that some cooperatives do so at a "greater fin cial burden" (Vol. I, Jt. App. 115); and said Committee conclu as to "this type of service" that "proprietary handlers * * * perfo it" (Vol. V, Jt. App. 2216). As for the third ground, see note below, p. 12, respecting 1938 provision; and note 12, p. 14, respect 1953 Amendment.

[10] Unfortunately, Footnote 12 did not quote the full language the 1938 New York Order. Had it done so, the word "mu [arrange for and supply, etc.] would not have been used there adopted below. The actual language of the 1938 provision originally limited to "best efforts", amended in 1941 to read "co mensurate with the marketing capacity"; Appendix, p. 10 (footno The latter meant only "marketing ability", as shown by the fact only about 30% of the qualified cooperatives operated any pla i.e,, had any "capacity" in the physical sense (21 out of 66 in 19 Vol. VII, Jt. App. 3147; and only about 8 of these operated sur disposal plants). See note 6, p. 10 above.

On the very face of the 1938 provision, qualification for paym did not require any plant operation. Only the highest *rate* of p ment was made to cooperatives operating plants; Sec. 927.76 Appendix, p. 11; and these qualified for payments on all milk ceived" at all their plants, *irrespective* of whether the milk was u as surplus milk or bottled for fluid consumption, and irrespectiv whether the plants were surplus manufacturing plants. Theref the 1938 payment was *unrelated* to surplus milk disposal, for m bers or non-members; see also note 6, p. 10 above.

Reference in the 1938 provision to "sufficient plant capacity" non-members deals merely with an *additional volume of milk* which payments could be made, and the volume of milk by w payments are measured is not at issue in this case.

the 1938 New York Order. This footnote does not state the kind of provision which this Court would sustain. It merely indicates that the Boston Order did not even include a provision related to surplus handling, and therefore did not require the Court to give any further consideration to the contention that surplus handling supported the challenged payments. Thus, the court below not only disregarded the three grounds on which this phase of the 1938 provision herein is indistinguishable from the Boston Order, but misapplied the fourth.

4. With respect to the 1953 Amendment, the court below misapplied Footnote 12 of the *Stark* case (Appendix, p. 37): "The requirements mentioned by the Court are essentially retained and even made more specific by the 1953 amendments to the Order. With reference to maintaining facilities for the disposal of surplus milk, a cooperative in order to qualify for the relevant payment [an additional one cent per cwt.] must operate marketing facilities, or have within its membership federated cooperatives operating marketing facilities, 'at which is received at least 25 per centum, by weight, of the milk marketed by all the *members* of the cooperative or by all the *members* of the federated cooperatives.'" (Emphasis ours.) This quotation from Sec. 927.76(e), Condition (6), of the 1953 Amendment is inapplicable. In the first place, only "operating facilities" are referred to therein, without any requirement that these be "facilities for the disposal of surplus milk" (and in fact, in most instances they are not such manufacturing facilities, but only plants for shipping raw fluid milk).[11] This omission from the 1953 Amendment is emphasized by the absence therefrom of any provision for payment by reason of any expense or financial burden in operating surplus dis-

[11] See note 10, p. 12 above.

posal facilities.[12] More significantly, this requirement th
the operating facilities receive "at least" 25% of the mi
of "members" is not a requirement to receive or be able
receive any non-member milk; nor is it a requirement to
ceive or be able to receive "all of the milk of * * * member
(1938 provision). Since the 1953 Amendment thus elim
nated the language of the 1938 provision cited in Foo
note 12 of *Stark*, the irrelevance of the substance of Foo
note 12 becomes even more apparent.

Finally, the court below found that the 1953 Amendme
"made no material change" in the 1938 provision referre
to in Footnote 12 of *Stark*, "with regard to the requir
ments imposed upon cooperatives to dispose of milk in su
a way that all producers will benefit." Sec. 927.76(g)(
(iii), Appendix, p. 24. However, as shown immediate
above, the 1953 Amendment, by containing no provision f
surplus disposal facilities, or for receiving all member mi
or for receiving any non-member milk, falls within t
clear language of the text in the *Stark* opinion (at 460-46
discussed above, p. 11) and the Boston Order. Th
renders the above clause of such limited scope that t
Secretary himself did not include it among the requir
ments for qualification, the six conditions in Sec. 927.76(e

It is submitted, therefore, that the decision below is
conflict with *Stark:* it is a decision which ignores the inte

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[12] The 6 "requirements" in Sec. 927.76(e) for payment under t
1953 Amendment deal entirely with order activities and education
activities, rather than compensation for the cost of operating su
plus disposal facilities. Condition (6) merely entitles cooperativ
(in fact, only one) operating any kind of plants to receive an add
tional one cent per cwt., based only on the finding that these "are
a more advantageous position than non-operating cooperatives f
discerning the need to change class prices" (Vol. I, Jt. App. 11
line 1). Thus, the additional one cent is not based on any financi
burden of surplus disposal plant operation; indeed, no finding w
ever made on the amount of any such burden, and the extra cent
also paid to federations which operate no plants whatever.

The Secretary here followed Conclusion No. 10 of his Offici
Committee of Experts (Vol. V Jt. App. 2216): "The Committ
concludes that cooperative payments should be related to the mai
tenance of surplus handling facilities *only* to the extent that su
activity enables the cooperatives to perform 'Order Activities an
Education' more effectively."

pretation of the Act made in *Stark*, and which rests instead on the views of the Secretary as to policies he believes desirable; and it is a decision which misapplies *Stark* in attempting to distinguish that case.

The court below has decided a federal question of statutory interpretation in a way which conflicts with applicable decisions of this Court, other than *Stark*. This Court has held that basic questions of statutory delegation of power must be resolved *before* reliance on findings of necessity made by an administrative agency. Agency findings of "necessity" did not control in *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 508 at Footnote 16, 509 (wherein it was deemed that natural gas is the very "lifeblood" of a pipeline system). See also *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, 600. In *Addison* v. *Holly Hill Co.*, 322 U. S. 607, the hearing record included 24 volumes and 36 pages of examiner's findings. In *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, the Commission relied on "two bulky volumes" (110 F. Supp. 374, 383) of evidence, in support of its conclusion that the regulation was within its "necessary" and "not inconsistent" powers (*id.*, at 383; and 347 U. S. at 289, note 7); but this Court held that such conclusion would not permit "stretching the statute" (at 294).

In sanctioning expansion of the Act by resort to the "auxiliary powers clause", the court below decided contrary not only to *Stark*, but also in conflict with *U. S.* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 575, which emphasizes the limited scope of the "auxiliary powers clause"[13] of this Act.

The above cases, as well as *Stark*, illustrate basic principles of statutory interpretation which the court below did not apply. In disregarding the clear language requiring

[13] See especially Footnote 16 in *Stark*, 342 U. S. at 465.

"uniform prices," and in disregarding the particulari
tion with which the Act authorizes orders containi
enumerated terms and "no others" and specifies the "onl
adjustments permitted to be made in such prices, t
court below decided in conflict with the many decisi
of this Court which require observance of such expressi
of Congressional intent.

**II. This case involves a substantial federal questi
of general importance.**

This case involves a substantial question of general i
portance under a statute of the United States, the Agri
tural Marketing Agreement Act of 1937. The decision
the court below pertains to construction of the basic p
vision of this Act, Sec. 8c(5), authorizing "unifo
prices" for milk, pursuant to which milk marketing ord
have now been promulgated by the Secretary of Agri
ture for 64 major milk markets throughout the nati
Cooperative associations function in each of these mark
Nothing in the decision of the court below precludes
application thereof to any similar provision for payme
to other cooperatives, if adopted in any of the other n
orders presently effective.[14] At the time of *Stark*, simi
payments were provided in four orders, including Bost
Cincinnati and Dayton (*Stark*, at 466, note 19). Therefo
the decision is of national significance and involves an
portant question with far-reaching effects on the admi
tration of the Act.

[14] In a Motion for Leave to File Brief *Amicus Curiae*, filed in
court below on behalf of respondents, a federation of cooperat
asserted (par. 3) that "many of its members are performing mar
wide services of various kinds in markets regulated by Federal
marketing orders, and others plan to perform such services in
future if the validity of payments to cooperatives for such servic
sustained in this case." The brief, p. 10, also states "the effec
the decision in this case is not local in character." The Secre
filed his consent to said motion.

The 64 federal milk orders, presently in effect, regulate about 30 billion pounds of milk produced annually by over 200,000 dairymen.[15] The New York order alone covered milk valued at $312,000,000 in 1954, produced by about 50,000 dairymen.[16] It is estimated that, in the 50 orders which presently prescribe Producer Settlement Funds, over a billion dollars of monies belonging to dairymen are committed every year to the Secretary's trusteeship[17] under the Act.

The deductions for cooperatives out of the Producer Settlement Fund under Order No. 27, only since this action was instituted, have amounted to over $5,700,000, of which about $2,550,000 is held in escrow awaiting disposition by this Court.

This case is the very first which sustains an unrecoverable charge[18] in the nature of a tax[19] against non-members, to finance certain private cooperative corporations out of the Producer Settlement Fund;[20] and such Funds are presently authorized in about 50 federal milk orders. By the decision below, the vast amounts of monies in all such Producer Settlement Funds are now vulnerable to these and other charges, for these and other payments. The Act contains no specific language expressly authorizing such charges or payments, and provides no standards by which to determine the nature or amount of such charges or pay-

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[15] At the end of 1954, 53 federal milk orders were effective, regulating over 27 billion pounds of milk produced by over 186,000 dairymen. *Report of Dairy Division*, Department of Agriculture, p. 22, presented at Hearings of the Dairy Sub-Committee, House of Representatives Committee on Agriculture, April 19, 1955.

[16] Market Administrator's 1954 Annual Report, pp. 17, 19.

[17] See *Stark* v. *Wickard*, 321 U. S. 288, at 305.

[18] *Id.*, at 301.

[19] *Id.*, at 303.

[20] See Sec. 927.70 of Order No. 27, Appendix, p. 9.

ments. Therefore, this case is precedent for future interpretation of said Act, with consequences so far-reaching in its administration and in the prices received by farmers for their milk, as to warrant that the issue be settled by the Supreme Court.

III. If the decision below is not controlled by *Brannan* v. *Stark* it decides an important question of federal law which has not been, but should be, settled by this Court.

If this case differs from *Stark* in respects sufficiently substantial that the decision of this Court therein does not control this case, it necessarily follows that such substantial differences warrant review by this Court. This is the first case in which an appellate court (the court below) has sustained invasion of the Producer Settlement Fund prescribed in federal milk orders, by the deduction of moneys from all producers, including non-members, for payments to cooperative associations for any purpose. Unless controlled by *Stark,* this is a case of first impression; and its national importance has been established above, pp. 16-17.

IV. The decision of the court below is erroneous.

Sec. 8c(5) of the Act authorizes milk orders containing the enumerated terms and, except as provided in Sec. 8c(7), "no others". Sec. 8c(5)(B) of the Act expressly provides "only" for specified adjustments in "uniform prices" paid to producers and associations of producers for specific purposes: in brief, for (a) volume, market and production differentials, (b) the grade or quality of milk

(c) the location of delivery, and (d) a further adjustment, to accommodate a base-marketing program.[21]

Thus, we are here concerned with a statute which expressly provides for specific adjustments (deductions or additions) in the price of milk arising out of such ordinary and necessary factors as differences in volume, quality and location; Sec. 8c(5)(A) and (B). The Congress enumerated the specific marketing services for which deductions are permitted to be made, "except as to producers for whom such services are being rendered by a cooperative", Sec. 8c(5)(E), and the challenged payments for different purposes are clearly inconsistent therewith. The Congress specified certain rights and privileges to be accorded to cooperative associations; Sec. 8c(5)(F) and Sec. 8c(12); and Congress specifically preserved the *customary* source of revenue of cooperatives by precluding the Secretary from issuing any order that could require cooperatives to distribute the price of milk other than "in accordance with the contract between the association and its producers"; Sec. 8c(5)(F). This Court in *Stark* rightly held that since Congress considered such provisions of sufficient importance to specify them with such particularity, this established "the likelihood of similar specific authorization for the contested deductions if Congress intended that they should be made"; and that the special payments to certain cooperatives are "inconsistent" with Sec. 8c(5)(A) and (B) of the Act.

The Secretary herein levies a tax or charge against petitioners and all other non-members of cooperatives, to compel them to support financially the customary activities of efficient cooperatives, carried on generally throughout the

[21] This further adjustment, although relied upon by the Secretary in *Stark* and throughout the proceeding below, has been held in both cases to be entirely inapplicable to both the Boston and New York regulations in contest; see Findings entered in *Stark* v. *Brannan*, 82 F. Supp. 614, and the decision of the District Court in the instant case, Vol. I Jt. App. 177.

United States at member expense in their own self interest, in all major milk markets, whether or not under regulation.[22] Petitioners, some of whom belong to other farm groups, do not wish to support these cooperatives,[23] whose interests are often adverse to their own. They were not liable at common law for the indirect benefits to them from cooperative association activity. In *Stark*, this Court correctly ruled that the novel and extraordinary power to create the new liability imposed below cannot be found in the "omnibus subsection" of Sec. 8c(7)(D).

In effect, the Secretary found, and the court below erroneously concurred, that since cooperatives incur expenses in the performance of certain activities which may also benefit non-members, the Act should be rewritten by administrative action to prescribe "uniform expenses" (as well as "uniform prices"); that otherwise "unfair" disparity (Appendix, p. 31) would result. This, of course, is merely a conclusion that the challenged payments are proper as a matter of equity, but this is not application of the controlling statutory provisions. As this Court held in *Stark*, "the equity or the wisdom of the payments to cooperatives" (466) is not involved. Courts are concerned with "what Congress did, not what it could do"; *Federal Trade Commission* v. *Bunte*, 312 U. S. 349, 355.

The lack of statutory authority herein is emphasized by the absence of any standards as a basis for the Secretary's discretion: his 1953 amendments, by reducing the cooperative beneficiaries from over 70 to 2, by extending the payments to "federations", and by creating a classification based on membership of 4,000 or more, demonstrate the vast dimensions of the field which is opened up under the Secretary's view of the Act. Congress did not intend

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[22] See note 8, p. 11 above.

[23] Since 1953, members of small cooperatives must also finance the two large ones, a distinction of size upon which the Act is, of course, silent. See note 7, p. 10 above. The Act is also silent with respect to the "federations" of cooperatives, paid by the 1953 Amendment.

to subject the billions of dollars of producer monies to diversion among different groups through agency action not controlled by any statutory standards. Findings are no substitute for statutory authority; and the 1938 provision lacks even these.

Irrespective of differences in language between the Boston and New York orders, and between the 1938 and 1953 provisions of the New York order, the fact remains that such deductions and payments are unauthorized invasions of the trust funds known as the Producer Settlement Funds. Of the two large New York cooperatives, which alone are now permitted to qualify, one was an *Amicus* below (on behalf of petitioners) which urged exactly this. If any cooperatives believe that their activities under milk orders result in inequity, as compared with non-members and (since 1953) with smaller cooperatives, their beliefs should be urged upon Congress.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.,
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
Harrisburg, Pa.
of Counsel for Petitioners.

APPENDIX

Statute Involved

The following are relevant sections of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. Sec. 608c *et seq.*, reenacting, amending and supplementing the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended by the Act of August 24, 1935, 49 Stat. 750:

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof * * *.

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such

other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of

the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the

price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk. * * *[1]

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[1] We omit from this printing Sec. 8c(6) of the Act, which relates *only* to certain fruits, nuts, tobacco, vegetables, soybeans and naval stores. One provision is paragraph (D), which authorizes terms for such orders: "(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof."

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions: * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order. * * *

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers. * * *

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof. * * *

MILK PRICES

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its

products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions

of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12). * * *

Sec. 10(b)(1) * * * The Secretary, in the administration of said sections, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution. * * *

1938 ORDER PROVISIONS

The following are relevant sections of Order No. 27, 7 C. F. R. § 927.61 *et seq.* as effective in 1938 (until 1953). The entire Order appears substantially in Vol. II Jt. App. 451. The 1938 provisions challenged are Sec. 927.61(b) and Sec. 927.76, included below.

Sec. 927.61 *Computation of the uniform price.* The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the report submitted for the preceding month by each handler. If the unreserved cash balance in the producer settlement fund to be included in the computation is less than two cents per hundredweight of milk received from producers on all reports, the report of any handler who has not made payment of the last monthly pool debit account rendered pur-

suant to Sec. 927.71 shall not be included in the computation of the uniform price. The report of such handler shall not be included in the computation for succeeding months until he has made full payment of outstanding monthly pool debits. Subject to the aforementioned conditions, the market administrator shall compute the uniform price in the following manner:

(a) Combine into one total the net pool obligations of all handlers;

(b) Subtract the total of payments required to be made for such month by Sec. 927.76;

(c) Add the total payments required to be made by handlers for such month pursuant to Sec. 927.78;

(d) Add the amount of unreserved cash in the producer settlement fund;

(e) Subtract an amount equal to not less than eight cents nor more than nine cents per hundredweight of milk received from producers to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers;

(f) Subtract the Class 1-C milk of all handlers whose reports are included in this computation from the total milk received from producers by all such handlers; and

(g) Divide the result obtained in paragraph (e) of this section by the result obtained in paragraph (f) of this section. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants in 201-210 mile zone.

Sec. 927.62 *Announcement of uniform price and weighted average butterfat differential.* The market administrator shall announce not later than the 14th day of each month, the uniform price computed pur-

suant to Sec. 927.61 and not later than the 5th day of each month the weighted average butterfat differential pursuant to Sec. 927.67.

Sec. 927.70 *Producer settlement fund.* The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments and out of which he shall make all payments pursuant to Secs. 927.72 through 927.78.

Sec. 927.71 *Handlers' accounts.* The market administrator shall establish an account for each handler who is required to make payments to the producer settlement fund or who received payments from the producer settlement fund. After computing the uniform price and each handler's pool debit or credit each month, and at such times as he deems appropriate, the market administrator shall render each handler a statement of his account showing the debit or credit balance, together with all debits or credits entered on such handler's account since the previous statement was rendered.

Sec. 927.72 *Payment to the producer settlement fund.* On or before the 18th day of each month each handler shall make full payment of the debit balance, if any, of such handler shown on the last statement of account rendered pursuant to Sec. 927.71.

Sec. 927.73 *Payments out of producer settlement fund.* On or before the 20th day of each month the market administrator shall make payment to each handler of the credit balance, if any, of such handler shown on the last statement of account rendered pursuant to Sec. 927.71. If, at any such time, the balance in the producer settlement fund is insufficient to make full payment due to each handler, the market administrator shall reduce uniformly the payments to each handler and shall complete such payments as soon

as the necessary funds are available. No handler wh on the 25th day of the month, has not received suc payments in full from the market administrator sha be deemed to be in violation of Secs. 927.65 throug 927.67 if he reduces his total payments to producer for milk delivered by such producers during the pr ceding month by not more than the amount of the r duction in payment from the producer settlement fun

[1] Sec. 927.76 *Cooperative payments.* Any cooper tive association of producers may apply to the Secr tary for a determination of its qualifications to receiv payments pursuant to this section by reason of i having and exercising full authority in the sale the milk of its members; arranging for and supplyin in a manner commensurate with the marketing capa ity of the several types of cooperative associatio designated in this section, in times of short supp Class I milk to the marketing area; securing util zation of milk, in times of long supply, in a manne to assure the greatest possible return to all producer having its entire activities under the control of i members; and complying with all provisions of th subpart applicable to it.

After the Secretary has determined any cooperati to be qualified to receive payments pursuant to th section, such cooperative shall, from time to time, requested by the market administrator, make repor to the market administrator with respect to servic rendered to the market and the use of the sums r ceived under this section. Whenever the market a

[1] This section, one of the challenged provisions, was in effect wit out substantial change from Sep. 1, 1938 to Dec. 16, 1953. A amendment to Order No. 27 effective July 1, 1941, adopted t language "arranging for and supplying, in a manner commensura with the marketing capacity of the several types of cooperati associations designated in this paragraph" in lieu of "using its b efforts to supply."

ministrator has reason to believe that any cooperative qualified by the Secretary is failing to perform the obligations covered by the payments under this section, he shall suspend and hold in reserve such payments, notifying the Secretary and the cooperative of his action and the reasons therefor. Such suspended payments shall be held in reserve until the Secretary has, after hearing, ruled upon the performance of the cooperative and either ordered the suspended payments to be paid to the cooperative in whole or in part or disqualified the cooperative, in which event the balance of payments held in reserve shall be returned to the producer settlement fund.

The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

(a) Three-quarters of one cent per hundredweight of milk received from producers at any handler's plant which was caused to be delivered from its members by such associations and on which such handler has made the reports and payments required by this order;

(b) Except as set forth in paragraph (c) of this section, two cents per hundredweight of milk received from producers at plants of other complying handlers which was reported and collected for by such association; and

(c) Four cents per hundredweight of milk received from producers at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the

Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, four cents per hundredweight of milk received from producers which was caused by it to be delivered to any other complying handler and which is reported and collected for by such association.

1953 AMENDMENT TO ORDER

The following are findings and amendment adopted with respect to Sec. 927.76 of Order No. 27 effective December 16, 1953. This 1953 amendment expressly deleted Sec. 927.76 of the Order as effective prior thereto. The complete Secretary's Decision effective December 16, 1953, is set forth in Vol. I, Jt. App. 107-132.

Sec. 927.0 *Findings and determinations.* The findings and determinations hereinafter set forth are supplementary to and in addition to the findings and determinations previously made in connection with the issuance of the aforesaid order and of each of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings upon the basis of the hearing record.* Pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 *et seq.*), and the applicable rules of practice and procedure, as amended, governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order, as amended, regulating the handling of milk in the New York metropolitan

milk marketing area. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and the order, as amended, and as hereby further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act.

(2) The terms and conditions in Sec. 927.76 of the order, as amended, and as hereby further amended, are incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of Sec. 8c of the Act (7 U. S. C. Secs. 608c(5)-(7)) and necessary to effectuate the other provisions of the order.

(3) The terms and conditions in Sec. 927.76 of the order, as amended, and as hereby further amended, are necessary in order equitably to apportion the total value of the milk purchased by all handlers among producers and associations of producers, on the basis of their marketings of milk during each month which is the proper representative period.

(4) The terms and conditions in Sec. 927.76 of the order, as amended, and as hereby further amended, are necessary to accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in the relevant Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(5) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply of and demand for milk in

the marketing area, and the minimum prices specified in the marketing agreement and in the order, as amended, and as hereby further amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

(6) The marketing agreement and the order, as amended, and as hereby further amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in a marketing agreement upon which a hearing has been held.

Order relative to handling. It is therefore ordered that on and after the effective date hereof the handling of milk in the New York metropolitan milk marketing area shall be in conformity to and in compliance with the terms and conditions of the aforesaid order, as amended, and as hereby further amended; and the aforesaid order, as amended, is hereby further amended as follows:

Delete Sec. 927.76 of the order as now in effect and substitute therefor the following:

Sec. 927.76 *Cooperative payments for market-wide services.* Payments shall be made to qualified cooperatives or to federations under the conditions, in the manner, and at the rates set forth in this section.

(a) *Definitions.* As used in this section the following terms shall have the following meanings:

(1) "Cooperative" means a cooperaive association of producers which is duly incorporated under the cooperative corporation laws of a state; is qualified under the Capper-Volstead Act (7 U. S. C. 291 *et seq.*); has all its activities under the control of its members and has full authority in the sale of its members' milk.

(2) "Federation" means a federation of cooperatives.

(3) "Federated cooperative" means a cooperative which is a member of a federation and on whose membership the federation is an applicant for or receives payments under subparagraph (2) of paragraph (f) of this section.

(4) "Member" means, when used with respect to a member of a cooperative or of a federated cooperative, only a member who is also a producer, as defined in Sec. 927.6.

(b) *Qualified cooperatives and federations.* A cooperative or federation may submit an application to the Market Administrator for payments under the provisions of this section. In accordance with the requirements of the rules and regulations issued by the Market Administrator, any such application shall include a written description of the applicant's program for the performance of market-wide services, including evidence that adequate facilities and personnel will be maintained by it so as to enable it to perform the market-wide services; and the application shall contain a statement by the applicant that it will perform the required market-wide services for which it is applying for payments. The application shall set forth all necessary data so as to enable the Market Administrator to determine whether it meets the qualification requirements with respect to the payments for which the application is submitted. An application shall be approved by the Market Administrator only if he determines that:

(1) In the case of a cooperative:

(i) It has not less than 4,000 members and receives from its members not less than 1 cent

per hundredweight of milk delivered by them: *Provided,* That no person shall be counted in this respect as a member if he is a member of another cooperative which is an applicant for or which receives cooperative payments, or if he is a member of a federated cooperative.

(ii) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, it has not less than 6,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them, subject to the proviso of subdivision (i) of this subparagraph.

(iii) If the application is also for an additional payment under subparagraph (4) of paragraph (f) of this section, the cooperative is an operating coperative which operates marketing facilities, *i.e.,* pool plants(s), at which it receives at least 25 per centum, by weight, of the milk marketed by its members; *Provided,* That in determining whether the 25 per centum minimum requirement is complied with, there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(2) In the case of a federation:

(i) It is duly incorporated under the laws of a state.

(ii) It has contracts with each of its federated cooperatives under which the cooperatives agree

to remain in the federation for at least one year, and such contracts cover or will be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes.

(iii) Its federated cooperatives have an aggregate of not less than 4,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by them; and its federated cooperatives will pay to the federation, when required by rules and regulations issued by the market administrator, the minimum monthly payment specified in the rules and regulations to finance the activities of the federation that are not market-wide in character: *Provided,* That no person shall be counted in this respect as a member if he is a member of a cooperative which is an applicant for or which receives cooperative payments, or if he is a member of another federated cooperative.

(iv) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, the aggregate membership of the federated cooperatives is not less than 6,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by their members, subject to the proviso in subdivision (iii) of this subparagraph.

(v) If the application is also for an additional payment under subparagraph (5) of paragraph (f) of this section, the federation operates marketing facilities, *i.e.*, pool plants(s), or the federated cooperatives operate marketing facili-

ties, at which is received at least 25 percentum, by weight, of the milk marketed by the members of the federated cooperatives: *Provided,* That in determining whether the 25 percentum minimum requirement is complied with, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) The applicant cooperative or federation demonstrates that it has the ability to perform the market-wide services for which application is made, and that such services will be performed.

(4) The applicant cooperative or the federated cooperatives of an applicant federation are in no way precluded from arranging for the utilization of milk under their respective control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(c) *Notice of qualification or denial: Effective date.* Upon determination by the market administrator that a cooperative or a federation is qualified to receive payment for performance of the market-wide services, he shall transmit such determination to the applicant cooperative or federation and publicly announce the issuance of the determination. The determination shall be effective with respect to milk delivered on and after the first day of the month following issuance of the determination. If after consideration of an application for payment

for market-wide services, the market administrator determines that the cooperative or federation is not qualified to receive such payments, he shall promptly notify the applicant and specifically set forth in such notice his reasons for denial of the application.

(d) *Requirements for continued qualification.* From time to time and in accordance with rules and regulations which may be issued by the market administrator, each qualified cooperative or federation must demonstrate to the market administrator that it continues to meet the qualification requirements for the payments and is fully performing the market-wide services for which it is being paid.

(e) *Market-wide services.* Each cooperative or federation shall perform the market-wide services enumerated in this paragraph. Such services are: (1) analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs

for submission thereafter; (5) conducting a comprehensive educational program among producers—*i.e.*, members and non-members of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend; and (6) in the case of a cooperative or federation which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of this section, operating marketing facilities, or having within its membership federated cooperatives operating marketing facilities, *i.e.*, a pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives' members.

(f) *Rate, computation, time, and method of payment.*

(1) Subject to the provisions of paragraph (g) of this section, the market administrator, on or before the 25th day of each month, shall make payment out of the producer-settlement fund, or issue equivalent credit therefor, to each cooperative or federation which is qualified for such payments for market-wide services. The payment to a cooperative shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from its members, and the payment to a federation shall be based upon the milk reported by cooperative or proprietary handlers to have been

received during the preceding month from the members of its federated cooperatives, subject in both instances to adjustment upon verification by the market administrator.

(2) Such payment or credit shall be at the rate of 2 cents per hundredweight of milk in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing payment to a cooperative, there shall be excluded all of the milk of its members who belong to another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk; and *Provided further,* That in computing payment to a federation there shall be excluded all of the milk of members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) Any cooperative that has at least 6,000 members and any federation which has an aggregate membership of its federated cooperatives of at least 6,000 members shall receive a payment, in addition to the payment provided for in subparagraph (2) of this paragraph, of 1¢ per hundredweight of milk in accordance with subparagraph (1) of this paragraph and subject to the provisos contained in subparagraph (2) of this paragraph.

(4) Any cooperative that operates marketing facilities, i.e., a pool plant(s), at which is received at least 25 per centum, by weight, of the milk

marketed by its members shall receive a payment in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph of 1 cent per hundredweight of all milk marketed by its members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(5) Any federation that operates marketing facilities, i.e., a pool plant(s), or whose members include one or more federated cooperatives that operate marketing facilities, at which is received at least 25 per centum, by weight, of the milk marketed by the members of its federated cooperatives shall receive a payment in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by such members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(6) If an individually qualified cooperative is affiliated with a federation, the cooperative pay-

ment shall be made to such cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments.

(g) *Disqualification.*

(1) The market administrator shall issue an order wholly or partly disqualifying a previously qualified cooperative or federation for payments authorized pursuant to this section and such payments shall not thereafter be made to it if he determines that:

(i) The cooperative or federation no longer complies with the requirements of this section: *Provided,* That in the case of the federation, if one of its federated cooperatives has failed to comply with the requirements of this section applicable to it or has failed, promptly after demand by the market administrator to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification, the federation shall be disqualified only to the extent that its qualification for payments or the amounts of its payments are based upon the membership, milk or operations of such non-complying federated cooperative.

(ii) The cooperative or federation has failed to make reports or furnish records pursuant to this section or pursuant to rules and regulations issued by the market administrator.

(iii) In the case of the cooperative, it has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification; or

(2) An order of the market administrator wholly or partly disqualifying a cooperative or federation shall not be issued until after the cooperative or federation has had opportunity for hearing thereon following not less than 15 days' notice to it specifying the reasons for the proposed disqualification. If the cooperative or federation fails to file a written request for hearing with the market administrator within such period of 15 days, the market administrator may issue an order of disqualification without further notice; but if within such period a request for hearing is filed, the market administrator shall promptly proceed to hold such hearing pursuant to rules and regulations issued by him under paragraph (i) of this section.

(3) A disqualification order issued by the market administrator shall set forth the findings and conclusions on the basis of which it is issued.

(h) *Appeals.* * * *

(i) *Regulations.* The market administrator is authorized to issue regulations and amendments thereto to effectuate the provisions of this section and to facilitate and implement the administration of its provisions, such regulations shall be issued in accordance with the following procedure: * * *

(j) *Reports and records.* A qualified cooperative or federation and any federated cooperative in a

qualified federation shall make such reports to the market administrator as may be requested by him for the administration of the provisions of this section, and shall maintain and make available to the market administrator or his representative such records as will enable the market administrator to verify such reports.

(k) *Notices, demands, orders, etc.* All notices, demands, orders or other papers required by this section to be given to or served upon a cooperative or federation shall be deemed to have been given or served as of the time when mailed to the last known secretary of the cooperative or federation at his last known address.

(l) *Adjustment period.* Any cooperative which was qualified, on the effective date of this section, to receive payments pursuant to the provisions of Sec. 927.76 as effective December 31, 1952 (referred to in this paragraph as the "former provisions") shall continue to receive payments pursuant to and subject to the conditions specified in such former provisions on milk received from producers during the 90-day period immediately following the effective date of this section; and if such cooperative has applied, or is a federated cooperative of a federation which has applied, for qualification pursuant to this section prior to the expiration of such 90-day period, it shall continue to receive payments pursuant to the former provisions beyond such 90-day period until such time as the market administrator has ruled upon such application: *Provided,* That a cooperative or a federation may be qualified to receive payments pursuant to this section within such 90-day period; and *Provided Further,* That in no event shall a cooperative, or a federated cooperative in a federa-

tion, receive payment under the former provisions for any period following the effective date of qualification of the cooperative or federation under this section. For the purposes and to the extent specified in this paragraph, the provisions of Sec. 927.76 as effective December 31, 1952, shall remain in force and effect after the effective date of this section.

Opinion of United States Court of Appeals For the District of Columbia Circuit

Decided December 8, 1955

Before PRETTYMAN, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* The appeals involve the validity of payments authorized by certain parts of an Order regulating the marketing of milk in the New York Metropolitan Milk Marketing Area. The District Court sustained the payments as valid. The Order which provides for them, known as Order No. 27, 7 C.F.R. §§ 927.1 *et seq.* (1952), as amended, 7 C.F.R. §§ 927.1 *et seq.* (Supp. 1955), was issued originally by the Secretary of Agriculture in 1938, effective upon the issuance of a like order by the Commissioner of Agriculture and Markets of the State of New York, as part of a joint federal-state program. See 3 Fed. Reg. 1945-1951 (1938). The Secretary acted upon the purported authority of the Agricultural Marketing Agreement Act of 1937, c. 296, 50 Stat. 246, as amended, 7 U.S.C. §§ 601-700 (1952). The suit arose on complaint of six dairy farmers whose marketing of milk is regulated by the Order. They sought to enjoin the

Secretary[1] from making payments under section 927.76 of the Order to cooperative associations of milk producers or federations of such associations. The plaintiffs attacked this provision as unauthorized by the federal statute. After hearing and upon the basis of findings of fact and conclusions of law the District Court held for the Secretary and other defendants and entered judgment dismissing the complaint. The appeal in No. 12478 is from this judgment. *Pendente lite* the District Court issued a preliminary injunction requiring the Secretary and the Market Administrator to withhold and place in escrow portions of the payments in question. Upon dismissing the complaint the court vacated this injunction but stayed its action pending the appeal of plaintiffs in No. 12478. In No. 12498 the Secretary appeals from this stay order. The escrow fund has accumulated in the amount of over $1,500,000.

The Order is one of a number covering milk marketing areas in various parts of the United States. *Stark* v. *Wickard,* 321 U.S. 288, which also arose in this jurisdiction,[2] contains a general description of the purposes and nature of such orders. They set forth programs that are designed "to stabilize the price of milk, in aid of both producers and distributors or handlers, and to maintain orderly marketing conditions." *United Milk Producers of New Jersey* v. *Benson,* —— U. S. App. D. C. ——, ——, 225 F. 2d 527, 529. As we there also said,

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[1] We refer only to the Secretary in the text of the opinion. Reference to other appellees, who are officials concerned with the administration of the Order, is omitted for purposes of simplicity. The Commissioner of Agriculture and Markets of the State of New York and certain cooperative associations and federations of such associations were permitted to intervene in the District Court and are appellees in No. 12478 and appellants in No. 12498.

[2] See 78 U. S. App. D. C. 44, 136 F. 2d 786.

> "* * * The validity of the statute and of particular marketing orders made under its terms has been upheld in opinions which elaborate the legal and economic aspects of the program. United States v. Rock Royal Co-op, 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446; H. P. Hood & Sons v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478."

A general description of Order No. 27 is perhaps desirable before turning to its particular provisions under attack. The Order has many features in common with others which have been before the courts. The purpose of the Order as described in the Secretary's brief, not controverted in this respect, is to establish uniform minimum prices to be paid by handlers and uniform prices to be paid to producers. The first aim is achieved by setting uniform minimum prices for each milk use classification, such as fluid milk, cream, and various manufactured milk products. Thus the price paid by the handler is geared to the use which he makes of the milk. In contrast, the marketing plan is designed to give the producer a uniform price for all the milk he sells regardless of the use made of it by the handlers who purchase it. Several steps are involved in reaching this uniform price. The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions, including a deduction for payments to cooperatives for marketwide services, the payments here under attack. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, *i.e.*, a calendar month, is

greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

The payments to cooperative associations[3] of producers sought to be enjoined are specified in section 927.76 of the Order.[4] The payments are subject to elaborate qualifications the cooperatives must meet with respect to services and reporting. To understand better the place of the cooperatives in the total scheme, some of the findings of the Secretary, made after extensive administrative hearings, are now outlined. See 18 Fed. Reg. 6458-6465 (1953). The Secretary found that the milk supply for the New York Metropolitan Milk Marketing Area is produced by approximately 50,000 dairy farmers scattered over six states in a milkshed which extends more than 400 miles from the marketing area. The value of the milk whose price has been regulated in this area has in recent years exceeded $300,000,000 annually. The volume of milk was approximately seven billion pounds in the year 1952. Price fixing under this huge program is not static; it requires constant attention. Problems in the vast milkshed empha-

[3] We use interchangeably the expressions "cooperatives," "cooperative associations" and "federations of cooperative associations," for, though they may differ in composition, the differences are not material for purposes of this case.

[4] This section of the Order went through amendment during the course of the litigation. The complaint was filed in March, 1952, at which time § 927.76 was in the text originally adopted. See 7 C.F.R. § 927.76 (1952). It was altered by amendment effective December 16, 1953, see 7 C.F.R. § 927.76 (Supp. 1955), after which the complaint was also amended to cover the changed situation.

size the need for active participation in the program by producers. Producer groups must be prepared day by day to submit detailed data as to the market situation, so that the total milk supply will be properly utilized and the greatest return will be brought to all producers under the marketwide pool. The interests of proprietary handlers, a small group, are well represented. In the absence of informed participation by producers they would be at a disadvantage, a result which would be inconsistent with the statutory scheme and with the public interest. But the 50,000 individual producers are not generally able to attend the numerous hearings which it is necessary to hold from time to time on proposed amendments to the Order. The individual dairy farmer, moreover, does not have available the technicians and data necessary to effective representation of his interests at these meetings. He cannot with his limited means maintain the staff necessary to initiate requests for amendments and keep informed as to current market conditions and other changing circumstances in the highly complex field of milk marketing. Therefore active participation by producers under this program is feasible, as was here expressly found, only by means of cooperative associations of producers. Such cooperatives are required to perform the aforementioned marketwide services in order to qualify for the contested payments. In addition, they may be required to channel their milk into those utilizations that are most advantageous to the marketwide pool, thereby enhancing the value of the pool to the advantage of all producers in the milkshed. Finally, some cooperatives maintain manufacturing plants necessary to insure an outlet for the surplus milk which presents a recurring problem in the highly seasonal milk market. Thus it must be concluded that the cooperatives as a group advance the interests of producers generally throughout the milkshed. To the extent that producers' interests in the classification, pricing and pooling provisions of the Order may differ, such multiple interests are

represented by the cooperatives, for they are distributed throughout the milkshed and are of various types and sizes. Without the payments to cooperatives the cost of marketwide services rendered by them must be borne exclusively by their members, engendering an unfair disparity between members and nonmembers. All producers receive the value of the marketwide services and should pay for them on the same pro rata basis without regard to whether or not they happen to be members of the cooperative associations which perform the services. The cooperatives are under the constant scrutiny of the Market Administrator, and upon failure to perform the specified services the payments are discontinued. The cooperatives incur expenses in the performance of marketwide services at least equal to the amounts received as payments from the equalization or producer-settlement fund. Approximately 70 per cent of the producers are members of cooperative associations, and the value of the marketwide services is worth more to each producer than the small sum paid to the cooperatives.[5]

These findings of the Secretary, we repeat, were based on evidence taken at extensive hearings. At these hearings analyses of many experts were received. The record of the hearings, with the findings and conclusions of the Secretary, was before the District Court. The court found that the findings and conclusions of the Secretary were based on and supported by substantial evidence in the record of the hearings, which was certified by the Secretary to the court for review and was received in evidence as the hearing record upon the basis of which the court was to render its decision. *Cf. National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227. On the whole record the court held that the challenged provisions are authorized by the statute.

[5] The average annual expenditure per producer for the payments is approximately $25.00, while a change of only 1% in the uniform price affects the annual income of a producer by more than $60.00.

Appellants in their main brief in this court do not challenge as unsupported by the evidence the findings of fact of the Secretary or of the court. In their reply brief they do seem to question the correctness of some of the Secretary's findings, but we understand their contention actually to be that the findings are immaterial and not a substitute for the alleged lack of statutory authority. In other words, their position is that the payments, and the provisions of the Order authorizing them, are unauthorized by the statute. In any event, we accept the findings of fact of the court below, and therefore of the Secretary, as supported by substantial evidence in light of the record as a whole. This leaves for consideration the question of statutory authority upon which appellants rest their case.

Section 8c(5) of the Act[6] provides that in the case of milk and its products,

> "* * * orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:
>
> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay * * * for milk purchased from producers, or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk * * * is made to such handlers.
>
> "(B) Providing:
>
> "(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them * * *."

[6] 49 Stat. 754-755, as amended and re-enacted, 7 U.S.C. § 608c(5) (1952).

Subsection (7) of section 8c provides that orders shall contain "one or more of the following terms and conditions," followed by an enumeration including subsection (D) of subsection (7), which reads as follows:

> "(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

We agree with the District Court that these provisions of the statute support the challenged terms of the Order. Those terms as we have seen authorize payments to cooperative associations or federations thereof for marketwide services performed by them for the benefit of all producers, which includes the appellants. As we have also seen the Secretary under the statutory provisions is authorized to devise a "method" for fixing minimum prices for each use classification of milk, and all handlers must pay those prices for milk purchased from producers or associations of producers. The statute also directs, on the other hand, that the prices to be received by the producers are to be uniform, irrespective of the use made of the milk by the individual handler purchasing it. The orders made under the statute may contain terms incidental to and not inconsistent with the foregoing provisions, and necessary to effectuate them. It is incidental to, not inconsistent with, and necessary to effectuate both the method for setting class prices and the provisions for establishing a uniform price, that the Order provide for payments to cooperatives for services which are beneficial to all producers and reasonably necessary to the successful operation of the complicated program. Uniformity in the price received by producers is not destroyed by such payments. On the contrary, the findings are that the services for which they are made are of a marketwide character, and are of greater value to each producer than the small amount paid by him as his contribution to the cost. Fur-

ther, it is found that the cooperatives incur expenses in the performance of these marketwide services at least equal to the amount received from the fund. If the payments were for services beneficial only to members of the associations the case would be different. But they are for the benefit of nonmembers as well, and they are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted.

Appellants contend, nevertheless, that the decision of the Supreme Court in *Brannan* v. *Stark*, 342 U.S. 451, requires disapproval of the payments. We think this contention rests upon a misreading of that decision in its relation to the present Order. There the Supreme Court disapproved payments to cooperatives authorized by an Order for the Boston area.[7] That Order was issued under the same statute as was the Order in this case. While there is some language in *Stark* which might seem opposed to our decision, the facts there were so critically different from those in this case that such language must be deemed inapplicable. In the first place, most of the qualifying conditions imposed upon cooperatives by the Boston Order showed on their face that the services to be performed by the cooperatives were designed to aid only their members.[8] With reference to these conditions

[7] For an earlier history of the case, on the question of standing, see *Stark* v. *Wickard*, *supra*, and, in this court, *Brannan* v. *Stark*, 87 U. S. App. D. C. 388, 185 F. 2d 871.

[8] The Court, quoting 7 C.F.R. § 904.10(a) (Supp. 1947), listed these conditions as follows:

"'(1) It conforms to the requirements relating to character of organizaton, voting, dividend payments, and dealing in products of

the Court said, "But none of these shows any indication that the activity it prescribes will benefit nonmembers, with the possible exception of the seventh * * *." 342 U. S. at 459. The Court then disposed of the seventh requirement by stating that even if it comprehended a service to nonmember producers substantial enough to be significant in determining the validity of the mandatory contribution from them to cooperatives, "it does not support the exaction in issue, which concededly is based mainly upon other services primarily performed for members." 342 U.S. at 460. In this case, however, the marketwide nature and effect of the services to be performed by the cooperatives appear plainly from the text of the Order, and it is these services upon which the Secretary relies to justify the payments. Thus, for example, one of the requirements is "conducting a comprehensive educational program among producers—i.e., members and nonmembers of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing

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nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

" '(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

" '(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

" '(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

" '(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

" '(6) It constantly maintains close working relationships with its members.

" '(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

" '(8) It is in compliance with all applicable provisions of this subpart." 342 U. S. at 459 n. 9.

publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to nonmembers who request it, and holding meetings at which members and nonmembers may attend; * * *." 7 C.F.R. § 927.76(e) (Supp. 1955).[9]

In the second place, the Supreme Court did not have before it in the *Stark* case detailed findings of the Secretary and the District Court to the effect that the services performed by cooperatives are marketwide and are of great benefit to nonmembers as well as members. The record in this case, however, includes such findings, and they are well supported by the evidence. Hence we cannot conclude, as did the Court in *Stark*, that the activities required of cooperatives are only of incidental benefit to nonmembers.

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[9] The other qualifications are: "(1) Analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise in the referenda relative to amendments; (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter; * * * (6) in the case of a cooperative or federation which receives an additional payment under paragraph (f)(4) or (5) of this section, operating marketing facilities, i.e., pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives." 7 C. F. R. § 927.76(e) (Supp. 1955). Note should also be taken of the bases for disqualifying a cooperative, 7 C. F. R. § 927.76(g) (Supp. 1955), one of which is discussed in the text *infra*.

Finally, particular note must be taken of the difference between the Boston Order and the New York Order regarding the services to be performed by cooperatives in securing outlets for surplus milk and in disposing of milk so as to bring the highest net return to the fund. The significance of the difference is enhanced by the fact that the Court in *Stark* explicitly contrasted the Boston Order with the New York Order in this respect, pointing out that the latter expressly requires that an association to qualify for the payments "must arrange for and supply 'in times of short supply, Class I milk to the marketing area,' and must secure 'utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers.' 7 CFR, 1950 Cum. Supp., § 927.9(f)." 342 U.S. at 461 n. 12. Moreover, the Court noted that under certain circumstances the New York Order also requires cooperatives to be " 'determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members.' *Id.*, at § 927.9(f)(3)." *Ibid.* The Court stated that presumably the omission of such provisions from the Boston Order was deliberate, and added, "In fact, the Secretary admits that many of the cooperatives in the Boston area were unwilling or unable to perform services such as those required by the New York Order." *Ibid.* The requirements mentioned by the Court are essentially retained and even made more specific by the 1953 amendments to the Order. With reference to maintaining facilities for the disposal of surplus milk, a cooperative in order to qualify for the relevant payment must operate marketing facilities, or have within its membership federated cooperatives operating marketing facilities, "at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives." 7 C.F.R. § 927.76(e) (Supp. 1955). The Secretary found that the cooperatives which maintain

standby facilities to allow producers to dispose of surplu milk refused by proprietary handlers do so at a greate financial burden than proprietary handlers who operat similar plants. He also found that such financial burde is a major handicap to some cooperatives, and that th nature of this marketwide service warrants payment t the cooperatives. With regard to the requirements im posed upon cooperatives to dispose of milk in such way that all producers will benefit, the 1953 amendment made no material change. The Order now provides tha a cooperative shall be disqualified if it "has failed promptly after demand by the market administrator, t arrange for the utilization of milk under its control s as to yield the highest available net return to all pro ducers without displacing an equivalent quantity of othe producer milk in the preferred classification * * *." C.F.R. §§ 927.76(g)(1)(i), 927.76(g)(1)(iii) (Supp. 1955) The Secretary found that the cooperatives perform marketwide service in acting so as to assure the mos desirable class utilization of milk, and the statements mad by the Supreme Court in the *Stark* case indicate it woul concur in that view. Confronted with these findings o the Secretary and the words of the Supreme Court re garding services performed by cooperatives under th New York Order in helping to solve the problems o surplus milk disposal and proper channeling of milk i the market, it is our view that the *Stark* decision is no hostile to the conclusion we reach and that, indeed, th opinion in some respects supports it.

The stay is vacated and in othe respects the judgment is affirmed

PRETTYMAN, *Circuit Judge,* dissenting: I am unable t distinguish *Brannan* v. *Stark* as my brethren do. Despit what they point out, it seems to me clear that the Suprem Court held the same conditions present in our case, o certainly very similar conditions, not to justify deduction

for payments to the cooperatives. I do not overlook the contrast noted by the Court between the New York and the Boston orders, but that notation seems to me not to affect the gist of the Court's opinion. Were it not for my inability to distinguish that case, I would agree entirely with the excellent analysis and disposition of the problem which appear in the present opinion of this court.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1955

Before: PRETTYMAN, FAHY and DANAHER, *Circuit Judges.*

These appeals came on to be heard on the records from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that that portion of the judgment of the District Court staying pending appeal the provisions of paragraph 3 of the judgment entered September 24, 1954 in Civil Action No. 1081-52 be, and it is hereby, vacated, and that the said judgment of September 24, 1954, in all other respects be, and it is hereby, affirmed.

IT IS FURTHER ORDERED by the Court that the defendants in said Civil Action No. 1081-52, except the officers of the United States, recover against plaintiffs their taxable costs on these appeals and have execution therefor.

Dated: December 8, 1955.

PER CIRCUIT JUDGE FAHY.

Separate dissenting opinion by Circuit Judge Prettyman.

Order.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1956

Before: PRETTYMAN, FAHY AND DANAHER,
Circuit Judges, in Chambers.

Upon consideration of the motion of appellants in case No. 12,478, appellees in case No. 12,498, to stay transmission of certified copies of the judgment and opinion of this Court to the District Court on the ground that it is the intention of said parties to make an application to the Supreme Court of the United States for a writ of certiorari, and to continue in effect the partial stay granted by the District Court, and of the answers to said motion, it is

ORDERED by the Court that the transmission of certified copies of the opinion and judgment of this Court be, and it is hereby, stayed to and including February 6, 1956.

IT IS FURTHER ORDERED by the Court that the partial stay order of the District Court, as modified by the orders of this Court entered January 24, 1955, be, and it is hereby, continued in effect until issuance of certified copies of the opinion and judgment of this Court to the District Court, or, if application is made to the Supreme Court of the United States for a writ of certiorari, until final disposition of these cases by the Supreme Court of the United States.

Per curiam.

Dated: January 10, 1956.

Order.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1956

Before: PRETTYMAN, FAHY AND DANAHER,
Circuit Judges, in Chambers.

Upon consideration of the motion of the appellants in case No. 12,478, appellees in case No. 12,498, to stay issuance of the opinion and certified copy of the judgment of this Court, and of the answers to said motion, it is

ORDERED by the Court that issuance of the opinion and certified copy of judgment of this Court be, and it is hereby, stayed to and including February 16, 1956. No further stay of issuance of opinion and certified copy of the judgment will be granted.

Per curiam.

Dated: February 2, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 697

OSCAR L. GRANT, ET AL., *Petitioners,*

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT COOPERATIVES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and opinion of the United States District Court for the District of Columbia (R. 175-216) are unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit also is unreported but is printed at pages 26-39 of the appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The New York State Commissioner of Agriculture and Markets and the United States Secretary of Agriculture have established a joint State-Federal program for the regulation of milk for the New York metropolitan milk marketing area. The joint program is carried on pursuant to a State Order issued by the Commissioner under New York State laws and a complementary and identical Federal Order issued by the Secretary under the Agricultural Marketing Agreement Act of 1937. The State Order and the Federal Order each contain identical provisions compensating qualified cooperatives for the cost to them of specific market-wide services required to be performed by them for the benefit of all producers in the milkshed.

The validity of the State Order provisions is not contested by petitioners and petitioners abandoned in the Court of Appeals their contention that the Secretary's findings with respect to the Federal Order provisions were not supported by substantial evidence on the whole record. The narrow question presented, therefore, is whether under the circumstances set forth in the Secretary's uncontroverted findings the Federal Act authorizes the cooperative payment provisions adopted in the Secretary's Order as part of the joint State-Federal program.

There is a second question as to whether the action is a class action. That question was not decided by the Courts below and will be reached and become

necessary of decision only in the contingency of a reversal of the judgment below on the merits. The question, therefore, is not here discussed.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 U.S.C., § 601, et seq.) are set forth in the appendix to the petition, pages 1-7. The order involved (7 C.F.R. 1955 Supp., § 927.76) appears in the appendix to the petition, pages 14-26, and also in the Record at pages 125-132 and the findings of the Secretary of Agriculture with respect thereto in the Record at pages 108-123. The pertinent New York State statutes (McKinney's Consolidated Laws, Book 2-B, § 252, et seq.) and order are set forth in the appendices to the brief in opposition of the Commissioner.

STATEMENT OF THE CASE

This action is instituted by six milk producers in the milkshed supplying the metropolitan New York milk market. They seek to have declared illegal the cooperative payment provisions of the Federal order (R. 15).

These provisions of the Federal and State orders were first adopted by the Secretary and the Commissioner in 1938. (R. 681, 684-6; 3206, 3224-6) In 1952 the Boston order cooperative payment provisions were held invalid in *Brannan* v. *Stark*, 342 U.S. 451. This Court contrasted the provisions of the New York order (p. 461, n. 12). At that time, four Federal milk orders contained cooperative payment provisions, those for Dayton-Springfield, Cincinnati, and New

York, as well as Boston. Following this Court's decision, the Secretary concluded that the facts as to cooperative payments in the Dayton-Springfield and Cincinnati orders fell within the scope of the *Stark* decision and so he terminated those provisions, as well as those of the Boston order (R. 3168-3170). At the same time, the Secretary concluded that the facts as to the cooperative payment provisions in the New York order fell without the scope of the *Stark* decision and so he kept those provisions in effect (R. 3168, 108-9).

Thereupon this action was brought. The New York State Commissioner and 68 cooperatives intervened. (R. 46, 58) In consequence of order amendments providing for federations of cooperatives so as more effectively to render the marketwide services, two federations were formed of those cooperatives and 14 others and also intervened (R. 226). The District Court held the New York cooperative payment provisions valid and the Court of Appeals affirmed, one judge dissenting.[1] The Court of Appeals continued in effect the District Court action (R. 227-9) providing that certain percentages of the cooperative payments be held in escrow *pendente lite*. The cooperatives throughout the litigation have been performing the full services with only partial compensation.

Also in 1952 the Secretary and the Commissioner appointed a committee of 10 experts chosen from the faculties of six universities of States within the milk-

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[1] The dissenting judge stated—

> "Were it not for my inability to distinguish that case (*Brannan* v. *Stark*), I would agree entirely with the excellent analysis and disposition of the problem which appear in the present opinion of this Court."

shed to investigate cooperative payments under the New York orders (R. 109, 2120-2126). Members of the committee testified at length at public hearings held in 1953 and their testimony is a part of the Record in this case (R. 2119-2233, 2238-2325, 2418-2489, 2722-2757, 2777-2827, 2946-2980). Following these hearings and on the basis of a voluminous record consisting of approximately 40,000 pages, the Secretary and the Commissioner amended the cooperative payment provisions effective in December 1953 (R. 90-106, 65-79). The District Court held that the Secretary's findings were based upon substantial evidence in this record and the Court of Appeals held that the cooperative payment provisions are shown—

> "by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted."

In the Court of Appeals petitioners abandoned their attack on the findings.

Under the State and complementary Federal orders qualified cooperatives are required to render marketwide services for the benefit of all producers. They are compensated for these services from the producer settlement fund (see for description of the fund, the Court of Appeals opinion, Pet. App., pp. 28-29) which is a single joint fund under the State-Federal program. Likewise the payments are jointly made under the joint authority derived from the State and Federal orders. The Secretary found that in performing such marketwide services the cooperatives incur expenses at least equal to the amount of their compen-

sation (R. 119). On the other hand, the orders specifically require the cooperatives themselves to pay the entire cost of cooperative services that are not of marketwide character. To insure that cooperative payments are solely for marketwide services of benefit to all producers, cooperatives are required to receive from their members not less than 1¢ per cwt. of their members' milk to cover the entire cost of services that are not of marketwide benefit (R. 119, 126).

The value of the marketwide services was found by the Secretary to be worth more to each producer than the approximately $25 a year cost to him for the services (R. 118-119). The cooperative payments are not gratuities but are made solely for value actually received by all producers. Further, the Secretary found that all producers receive the value of the marketwide services and all producers should, in consequence, pay for them on the same pro rata basis without regard to whether or not they happen to be members of cooperatives performing the services (R. 114). The cooperatives are required to perform the marketwide services enumerated in the order and upon failure payment is discontinued and the action taken is publicly announced (R. 120-121).

The marketwide services are numerous and varied. They concern such matters as so utilizing surplus that the greatest return will be brought to all producers from the marketwide pool; advancing the interests of producers at the numerous hearings on pricing and other amendments and maintaining staffs and developing economic data for this purpose; keeping informed of current market conditions and other changing circumstances in the highly complex field of

milk marketing and, since price fixing is not static, initiating requests for amendments; maintaining standby operating marketing facilities; conducting comprehensive educational programs among all producers; supplying to the market fluid milk in times of short supply; and other required marketwide services. These services and their need for the benefit of all producers are set forth in detail in the Secretary's findings (R. 111-118) and in the Court of Appeals opinion.

ARGUMENT

1. There Is No Important Question of Federal Law

The question is one of statutory interpretation. It is not of general or even wide import but is limited to the power of the Secretary to adopt a provision found in one only of his numerous marketing orders applicable to a single commodity in a single area.

The Secretary of Agriculture has in operation under the Agricultural Marketing Agreement Act of 1937 95 orders dealing with the marketing of fruits, nuts, tobacco, potatoes, and milk. The question here is the validity of one section of one of those orders. That Order while important to the New York milkshed, is not an order of national scope. There are 64 milk marketing orders of the Secretary, each applicable to one of 64 different milk marketing areas scattered over the country. None of the other marketing orders, whether for milk or other commodities, contains cooperative payment provisions.

The Court of Appeals' decision is clearly limited to the application of the statute to the "significantly different" facts (R. 108-109) found to exist in the New

York milkshed and to an order fashioned to conform to those limited and unique facts. The situation is isolated and the decision narrow. Contrary to petitioners' assertion (Pet. p. 17) the Court of Appeals decision does not make it possible to provide for cooperative payments out of producer settlement funds in other orders for other areas.

Neither is there any basis for petitioners' implied assertion (Pet. p. 16) that the Secretary will adopt cooperative payment provisions in other marketing orders. A milk marketing order is tailored by the Secretary to fit the problems of the particular milk marketing area. Amendments thereto are not hastily adopted but only after extensive public hearings, findings by the Secretary on the basis of the records at such hearings, a producer referendum, and other proceedings under the Agricultural Marketing Agreement Act. It is not to be presumed that the Secretary would exercise his power frivolously or promiscuously.

Second, the unique characteristics of the New York milkshed prevent the question from becoming an important question of Federal law. The Secretary has found that (R. 111)—

> "The factors of size, diversity of conditions, specialization among handlers, divergency of interests, and complexity of price structures make this milkshed and regulatory program unique."

The other 63 regulated milksheds have not been found to possess characteristics or present problems comparable to those of the New York Order milkshed and there is no other milkshed where the cooperatives are required to perform corresponding marketwide services.

Third, the Secretary's Order for the New York milk marketing area is unique in being complementary to an identical order issued under Acts of the New York State Legislature. Complementary State and Federal orders are authorized by the New York law (§ 258-n) and the Federal Act (§ 10(i)) and are designed to operate as a single joint order (3 F.R. 1945, 1951, 2100, 2102). They provide for a single program administered by a single market administrator appointed jointly by the Secretary and the Commissioner.

The Federal order deals with a local area and its particular local problems. It stands alone in its inclusion of cooperative payment provisions, in being complementary to a State order, and in providing for a joint Federal-State program. The Federal question has no importance beyond the particular facts and parties involved. An episode in the history of milk marketing arising from economic facts peculiar to a particular local area, is not a basis for granting certiorari when the Court of Appeals decision is correspondingly restricted. For these several reasons, the question of Federal law is not an important Federal question.

2. THERE IS NO CONFLICT OF DECISION.

Petitioners urge the granting of the petition mainly on the ground that the District Court and the Court of Appeals decisions are in conflict with the decision of this Court in *Brannan* v. *Stark*, 342 U.S. 451. There is no conflict for the differences are factual. The *Stark* case dealt with the Boston Order. The facts as to the Boston Order were "critically different"

from those as to the New York Order. Among those differences are—

a. *Complementary State-Federal Orders.*—The Boston milk marketing program was solely a Federal order program. Here we have a joint State-Federal program. There is a single producer settlement fund established under the combined State and Federal authority from which the cooperative payments are made. There is no segregation of these payments or allocation of them in any respect between the State and Federal Orders or as between producers under those Orders.

In view of the joint program and joint sources of authority for cooperative payments the relief sought by petitioners cannot properly be granted, as they ask, against the Secretary alone. To invalidate the Federal Order would make inoperative the State Order. Nevertheless, the petitioners at all stages have refused to recognize the joint nature of the program and have directed their attack solely against the Secretary. The petitioners make no issue as to the validity of the State Order, presumably because the New York State law in specific terms provides for cooperative payments (L. 1937, ch. 383 and L. 1939, ch. 760; McKinney's Consolidated Laws, Book 2-B, § 258-m (10) and (11)). In consequence of petitioners' position the District Court held (R. 176) that the right and power of the State Commissioner to do what he did as regards cooperative payments is not in issue.

In this aspect of joint State-Federal program and joint sources of statutory authority for unsegregated cooperative payments, the New York Order differs wholly from the Boston Order and the Court of Ap-

peals decision does not conflict with the decision of this Court in the *Stark* case.

b. *The Order Provisions.*—This Court pointed out in the *Stark* case that the New York Order expressly requires that a qualified cooperative must arrange for and supply, in times of short supply, class I milk to the marketing area, and must secure utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers (p. 461, n. 12); likewise that cooperatives must have sufficient plant capacity to receive all the milk of producers who are members, and must be willing and able to receive milk from producers not members. The Boston Order contained no such provisions. The present New York Order, as the Court of Appeals held, has essentially corresponding provisions.

In the *Stark* case this Court also pointed out that in the Boston Order the services for which payment was made, were for the direct benefit of cooperatives' members and but incidentally helpful to other producers. Further, performance of the services was not a required condition to receipt of the payments (p. 464).

Here the facts are to the contrary. All producers, not merely cooperative members, receive the value of the marketwide services (R. 114). The New York Order requires that these services be performed. Constant scrutiny of such performance is made mandatory by the Order and regulations thereunder (R. 118, 120, 3170-3176, 3164; 19 F.R. 3415-3417).

Petitioners argue (Pet. p. 9) that the marketwide services are not for the benefit of all producers since the Order requirements for such services do not on

their face recite that they are to be performed for non-members. The Court of Appeals held " . . . the marketwide nature and effect of the services to be performed by the cooperatives appear plainly from the text of the Order . . ."

The New York and Boston Orders radically differ in both their legal and factual bases, and the narrow decision of the Court of Appeals as to the New York Order is not in conflict with the decision of this Court as to the Boston Order.

3. The Decision Below Is Clearly Correct.

The main basis for the decision of this Court in the *Stark* case was as follows:

The cooperative payment provisions were not incidental to, but inconsistent with, other terms and conditions for milk orders, inasmuch as the cooperative payments resulted in handlers not paying uniform prices for each class of milk and in producers not receiving uniform prices for their milk delivered. "This is true," this Court said, "because non-members are paid only the blended price while members receive, through their associations, the disputed payments in addition to the blended price." Such result follows for the reason that "the services for which the payment is made are performed for the direct benefit of the cooperatives' memberships, are but incidentally helpful to other producers, and are not a required condition to receipt of the payments."

These conclusions were factual conclusions as to the Boston Order situation. The New York Order situation requires its own separate analysis of the facts. This Court does not ordinarily grant certiorari

where the decision turns upon an analysis of the particular facts involved. The facts found by the Secretary and substantiated by both the District Court and the Court of Appeals negative any conclusion either that members of cooperatives receive the cooperative payments in addition to the blended price while nonmembers do not, or that the marketwide services are not required to be performed. Also the findings are that "the blended price which is computed after the making of these payments results in a price which is uniform for all of the milk" (R. 119). The District Court said (R. 181):

> "The very foundation of the Act as a whole is to secure a uniform price to all milk producers. The entire purpose of the Act fails if members of qualified cooperatives receive a lower price for their milk than non-members. Without the payment for the required marketwide services performed by the qualified cooperatives, there would exist a disparity in the blended price received by members of qualified cooperatives and non-members. . . . Therefore, to not deduct the amount paid qualified cooperatives would be inconsistent with the very wording of the statute and would violate the 'following terms and conditions' which require uniform prices to all producers and associations of producers for their milk."

The Court of Appeals affirmed this conclusion, stating:

> ". . . Uniformity in the price received by producers is not destroyed by such payments. On the contrary, the findings are that the services for which they are made are of a marketwide character, and are of greater value to each producer than the small amount paid by him as his contribution to the cost. Further, it is found that the cooperatives incur expenses in the performance of

these marketwide services at least equal to the amount received from the fund. If the payments were for services beneficial only to members of the associations the case would be different. But they are for the benefit of non-members as well, and they are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted."

This Court has held that it will not undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 and cases cited; adhered to on rehearing, 339 U.S. 605. Here no such showing has been made. On the contrary, petitioners' position appears to be that the proper application of the statute is to be determined *in vacuo* irrespective of the facts and uncontroverted findings.

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERIC P. LEE
Washington 6, D. C.
Attorney for respondent cooperatives.

EDMUND F. COOKE
Syracuse, New York

FRANK B. LENT
New York 17, New York,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 697

OSCAR L. GRANT, ET AL., PETITIONERS

v.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 175–183), and a supplemental opinion of that court (R. 219–222), are not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 26–38) is not yet reported.[2]

[1] The letter "R." is used to refer to the printed Joint Appendix, consisting of seven volumes, filed in the court below and presently filed with this Court. The pagination appears at the bottom of each page.

[2] The abbreviation "App." is used to refer to the Appendix to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1955 (App. 39). The petition for writ of certiorari was filed on February 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The primary provisions in the New York milk order issued by the Secretary of Agriculture relate to the pooling and pricing of milk, and auxiliary provisions in the milk order provide for payments to be made to certain cooperative associations of producers for the performance of specified market-wide services which, as found by the Secretary, are "worth more to each producer than the small amount paid to the cooperatives for the performance of the market-wide services" and the cooperatives necessarily "incur expenses in the performance of these market-wide services at least equal to the amount thus received from the producer-settlement fund." Also the order requires that a cooperative which receives the payments assess its members at least one cent per hundredweight of milk delivered by them, to pay the entire cost of the activities and operations of the cooperative which are not of market-wide character.

The question presented is whether the provisions for payments to cooperatives for the performance of specific market-wide services—as

provided in the Secretary's order, an order that is complementary to an identical order by the Commissioner of Agriculture and Markets of the State of New York—are within the statutory authority of the Secretary under the Agricultural Marketing Agreement Act of 1937.

STATUTE, ADMINISTRATIVE ORDER, AND FINDINGS INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 601, *et seq.*, are set forth in the Appendix to the petition for writ of certiorari at pages 1–7. The pertinent provisions of Order No. 27 (7 C. F. R. § 927.1, *et seq.*), which became effective on September 1, 1938, are set forth in said Appendix at pages 7–12. The pertinent provisions of Section 927.76 of that order, as amended effective December 16, 1953 (18 F. R. 7224, *et seq.*), are set forth in said Appendix at pages 12–26. The findings made by the Secretary of Agriculture when the New York milk marketing order was amended in 1953 are set forth in the Appendix to this brief, *infra*, pp. 26–66.

STATEMENT

Petitioners are five milk producers, not members of any cooperative[2] eligible to receive payments under Order No. 27 (R. 2, 5, 184). They

[2] The word "cooperative" is used in this brief to mean a cooperative association of milk producers or a federation of cooperatives.

instituted this action against the Secretary of Agriculture in March 1952, on behalf of themselves and of other similarly situated producers, challenging the validity of the provisions of the Order authorizing payments to cooperatives (R. 2–16). Following the 1953 amendment of the challenged provisions, the complaint was supplemented to bring the amended provisions within its scope (R. 136–139).

The Commissioner of Agriculture and Markets for the State of New York was allowed to intervene as a party defendant (R. 58). The basis for intervention was that Order No. 27, as originally issued and as subsequently amended, was in effectuation of a joint Federal-State program for regulating the marketing of milk in the New York Metropolitan Area (R. 50–51),[4] which joint program is authorized by Section 10 (i) of the Agricultural Marketing Agreement Act (7 U. S. C. 610 (i)) and Article 21, Section 258-n of the Agriculture and Markets law of New York. The court also permitted 68 cooperatives and two federations of cooperatives to intervene as parties defendant (R. 46, 224, 226).

[4] The joint program involved joint public hearings prior to issuance of the Order and each amendment thereof; issuance by the New York Commissioner of a milk marketing order, to be effective simultaneously with Order No. 27, containing regulatory provisions which, so far as relevant to the present action, are identical with those of Order No. 27; and administration of both orders by a single Market Administrator jointly appointed by the Secretary and the Commissioner (R. 50–51, 186–188).

The transcript of the public hearings on the protested provisions of Order No. 27 was introduced in evidence. The district court rendered an opinion holding that the Secretary's findings relating to these provisions had substantial evidentiary support and that, in the light of these findings, the provisions for payments to cooperatives were authorized by the statute (R. 175–183). The court filed detailed findings of fact (R. 183–215), and entered a judgment of dismissal (R. 226). The judgment vacated the preliminary injunction (entered in April 1952) providing that part of the sums payable to cooperatives under Order No. 27 be held in escrow, but the court stayed, pending appeal, its vacation of the preliminary injunction (R. 28–31, 226–227). The court of appeals affirmed the district court's judgment, but it kept alive, pending final disposition of the cause by this Court, the payments into an escrow fund required by the district court's preliminary injunction (App. 39–41).

The appellate court's opinion, written by Circuit Judge Fahy, pointed out that the Secretary had found that the required payments to cooperatives were in return for services which "are of a marketwide character, and are of greater value to each producer than the small amount paid by him as his contribution to the cost", and that the cooperatives in performing these services incur expenses "at least equal to" the payments they receive (App. 33–34). The court

stated that the services performed "are shown by massive evidence which we cannot ignore, followed by findings which we have no authority, rightfully exercised, to overturn, to be reasonably necessary to accomplish the purposes of the statute through the method adopted" (App. 34). It declared that the facts in *Brannan* v. *Stark*, 342 U. S. 451, were "critically different" from those in the instant case (*ibid.*), and that the *Stark* decision is not only not hostile to, but "in some respects supports", the court's conclusion that the challenged provisions of the New York milk order are authorized by the statute (App. 38).

Circuit Judge Prettyman in his dissenting opinion stated that he would agree entirely with the majority decision were it not for his inability to distinguish the case from *Brannan* v. *Stark* (App. 38–39).

As required by Section 8c (5) (B) of the Agricultural Marketing Agreement Act, Order No. 27 provides for payment of a uniform price to all producers, irrespective of the use made of the milk by the individual handler (i. e., dealer or processor) to whom it was delivered. The basic provisions of the order designed to accomplish this are: Each month the Market Administrator computes the total value of the milk marketed in the area. This value is determined by multiplying the quantity of milk of each Class

by its class price as fixed by the order.[5] This total value is then adjusted by making certain additions and subtractions, one of the subtractions being the payments required to be made to cooperatives. Dividing the total value, so adjusted, by the total quantity of milk marketed in the area gives the uniform price payable to all producers. 7 C. F. R. 927.40–927.44, 927.60–927.67.

The order does not authorize payments to all cooperatives, but only to those performing the obligations which qualify a cooperative to receive payments. The required market-wide services are also under the constant supervision of the Market Administrator,[6] and he shall disqualify a cooperative, and discontinue payments to it, if he finds that it is in default in performing these services (927.76 (g) (1), App. 23–24).[7] In addition a cooperative must, in accordance with the regulations issued by the Market Administrator, demonstrate to him from time to time

[5] The milk's Class depends upon the use made of it, milk sold as fluid milk having the highest class price.

[6] See regulations issued by the Market Administrator with respect to cooperative payments for market-wide services (19 F. R. 3415).

[7] The order in effect prior to 1953 likewise provided that whenever the Market Administrator had reason to believe that a qualified cooperative is failing to perform the obligations covered by the authorized payments, "he shall suspend and hold in reserve such payments" until the Secretary has, after hearing, "ruled upon the performance of the cooperative" (App. 10–11).

that it "is fully performing the market-wide services for which it is being paid" (927.76 (d), App. 19).

Under the order in effect until December 16, 1953, the "services to the market" which a cooperative had to perform embraced supplying fluid milk to the marketing area in times of short supply "in a manner commensurate with the [its] marketing capacity", and "securing utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers" (App. 10).[8]

These obligations are continued in the order as amended in 1953. It provides that a cooperative will be disqualified and payments to it discontinued if the Market Administrator determines that it has failed, promptly after demand by him, "to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification" (927.76 (g) (1) (iii), App. 23–24). The amended order also provides that a cooperative which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of Section 927.76 shall

[8] In *Brannan* v. *Stark* this Court referred to these express requirements of the New York Order, in "contrast" to the Boston Order, which the Court viewed as not requiring cooperatives to take any action directed toward solution of the problem of surplus milk. 342 U. S. 451, 461, and n. 12.

operate marketing facilities, *i. e.*, a pool plant or plants, which receive at least 25% of the milk marketed by its members (927.76 (e) (6), App. 20).

Under the order as amended in 1953 payment was to be made to a cooperative only if it performed, and agreed to perform (927.76 (b), App. 15), the following additional "market-wide services" (927.76 (e), App. 19–20):

> (1) analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data;
>
> (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions;
>
> (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments;
>
> (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations

issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter;

(5) conducting a comprehensive educational program among producers—i. e., members and non-members of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and hold meetings at which members and non-members may attend;

The 1953 change in the cooperative-payment provisions of the Order was made following a hearing on proposed changes in these provisions (*infra*, p. 26). The transcript of the testimony at this hearing was more than 1700 pages and numerous exhibits were introduced (*infra*, p. 27). Prior to the hearing the Department of Agriculture and the New York State Department of Agriculture and Markets had appointed a committee composed of ten economists and marketing experts (all college or university professors or assistant professors) familiar with the problems of marketing milk in the milkshed serving the New York metropolitan area, to make an independent study of cooperatives in relation to Order

No. 27 (*infra*, p. 30). At the hearing, a large part of the evidence consisted of the committee's recommendations and testimony and supporting data submitted by its members (*infra*, p. 32). Following the hearing, the Assistant Administrator of the Production and Marketing Administration filed a recommended decision and written exceptions were filed (*infra*, pp. 27–28). The Secretary reviewed and considered these exceptions and the record at the hearing, before making his own findings and before approving revision of Section 927.76 of the Order (*infra*, p. 29, App. 12–13).

The findings made by the Secretary are comprehensive, and include the following:

There are approximately 50,000 milk producers in the six-state milkshed serving the New York metropolitan area. This is not a sharply chiseled and segregated milkshed but it is overlapped and interlaced with the milksheds of the major cities of the northeast. There are therefore greater complications in pricing and supply than anywhere else in the United States. Price-fixing under the New York Order is never static. Frequent hearings on proposed amendments are necessary and during the period 1938–1949 more than 200 changes were made in the order's regulatory provisions, on 53 different occasions. (*Infra*, pp. 32, 34–35.)

The 50,000 individual producers are not able to attend the numerous and protracted hearings on proposed amendments, and they do not indi-

vidually have the data necessary to effective representation of their interests at such hearings. Nor is the individual producer able to submit relevant, comprehensive evidence with respect to the variable and diverse situations requiring prompt amendatory action (*infra*, pp. 32–33).

The interests and viewpoints of the proprietary handlers—a small group—are always well represented and, in the absence of alert and informed participation by producers the program would become one-sided (*infra*, p. 35). Such producer participation is essential to maintenance of effective regulation (*ibid.*). The statutory objective cannot be achieved unless producers actively participate in the formulation and operation of the Order and amendments to it (*ibid.*). Such active participation is feasible only by means of cooperatives (*infra*, p. 37). These associations of producers give constant attention to the various marketing and economic problems in the industry, actively participate in the hearings and other aspects of the Order's operation, and contribute in far-reaching respects to solution of the problems which must be solved (*infra*, p. 34).

Unless the Order provides for payment to cooperatives, the cost of the market-wide services which they render must be borne exclusively by their members, with resulting disparity between members and nonmembers. The services which cooperatives perform "are necessary services which are of distinct and far-reaching benefit to

producers who otherwise would be without effective representation." "All producers receive the value of such market-wide services and all producers should, under this regulatory program, pay for them on the same pro rata basis without regard to" membership or non-membership in a cooperative. "The Order applies to and benefits all producers", and not merely those who are members of cooperatives. (*Infra*, pp. 40–42.)

"The value to all producers of the performance of the market-wide services [performed by cooperatives] will at least equal the amount of the payments to the cooperatives" (*infra*, p. 52). "The cooperatives incur expenses in the performance of these market-wide services at least equal to the amount" payable to them under the amended order,[9] and "inasmuch as the payments are for the performance of market-wide services the payments are not for milk, but are for services, and thus the blended price which is computed after the making of these payments results in a price which is uniform for all of the milk" (*infra*, pp. 54, 55).

Cooperatives which operate marketing facilities, i. e., pool plants, "render services to the market as a whole" (*infra*, p. 51). They perform "market-wide service with respect to the maintenance of manufacturing plants for surplus milk", and their plants "are generally operated

[9] The payments to cooperatives represent about $25 for each producer in the milkshed (*infra*, p. 54).

more intermittently and at greater financial burden than similar plants operated by proprietary handlers" (*infra*, pp. 43, 44).

The terms and conditions of the provisions of the order for payment to cooperatives "are incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of Section 8c of the Act (7 U. S. C. Secs. 608c (5)–(7)) and necessary to effectuate the other provisions of the order" (App. 13).

ARGUMENT

I

Section 8c (5) of the Act provides that milk marketing orders shall contain one or more of certain enumerated terms and conditions, "and (except as provided in subsection (7)) no others". Subsection (7) (D) provides that a marketing order may contain terms or conditions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order." *Brannan* v. *Stark*, 342 U. S. 451, held that the cooperative-payment provisions of the Secretary's Boston milk order were not authorized by the statute because they were not incidental to, and were inconsistent with, the terms and conditions specified in subsection (5).[20] The principal question raised by the petition for

[20] Subsection (6) and subsection (7), other than (D) thereof, were irrelevant to the issue before the Court.

certiorari is whether the decision below is in conflict with this Court's decision in the *Stark* case.

The only findings of the Secretary, relating to the required payments to cooperatives, which were made in 1941 when the Boston Order was amended to provide for such payments, were that the payments "are incidental to, not inconsistent with, the other provisions of the order" and "necessary to effectuate" its other provisions, and that all of the terms and conditions of the amended order "will tend to effectuate the declared policy of the act." 6 F. R. 3762. See also Government brief in this Court in *Stark* case, pp. 95–96. Since these findings represented ultimate conclusions and did not show their factual foundation, this Court, on judicial review of the order, had to determine for itself the material facts.

The Boston order provided that cooperatives, to qualify for payments, had to meet eight requirements.[11] This Court said that none of them indicated that the activity it prescribed would benefit nonmembers, "with the possible exception of the seventh", and that the seventh does not support the provision for payment to cooperatives, which "concededly is based mainly upon other services" required by the order. 342 U. S. 459–460.

The Court held the cooperative-payment provisions not within authority conferred by 8c (7)

[11] The requirements are quoted in full in the *Stark* opinion, 342 U. S. note 9 at p. 459.

(D) upon the ground that they were inconsistent with the terms and conditions of Section 8c (5) (A), which provides that all handlers shall pay uniform prices for each class of milk, and also inconsistent with Section 8c (5) (B), which requires payment of uniform prices to all producers for all milk delivered. *Id.*, 463.

Although the Boston order provided that all handlers pay a uniform price for each class of milk, this Court concluded that the cooperatives which operated processing plants, and thus were "handlers", paid a lower price for their milk than did proprietary handlers, because the order provided for certain payments to cooperatives out of the producer settlement fund. *Id.*, 463. Since the Court concluded that the cooperatives were not required to perform, as a condition to receiving these payments, any service of benefit to the market as a whole (*id.*, 460–461), the payments were viewed as reducing the price which the cooperatives (operating as handlers) paid for the milk which they purchased, contrary to the terms and conditions of Section 8c (5) (A).

The Boston order established a uniform price payable to all producers for the milk they delivered, as required by Section 8c (5) (B), and the payment to cooperatives was simply one of the factors entering into computation of uniform price. But the Court concluded that the cooperative-payment provisions of the order resulted in cooperative members obtaining more for their

milk than nonmembers, and that these provisions were therefore inconsistent with Section 8c (5) (B). The Court reasoned that a member received, through his cooperative, the uniform price and, in addition, benefited individually from the payment to his cooperative, and this payment was deemed in the nature of a gratuity because the services performed as a condition to payment were, for all practical purposes, solely for the benefit of the members. *Id.*, 463–464.

The conclusion that the payments to cooperatives were inconsistent with the terms and conditions of Section 8c (5) (A) and 8c (5) (B) necessarily meant that the payments were also not "incidental" to these terms and conditions. *Id.*, 463.

In the present case, however, both the district court and the court of appeals have ruled that the Secretary's findings are supported by substantial evidence, and the petition for certiorari raises no question as to the correctness of this ruling. The findings abundantly and affirmatively establish the very factors the absence of which led this Court to invalidate the cooperative-payment provisions of the Boston order. The findings establish that the cooperatives who receive payments under the New York order perform, and are required to perform, services of basic importance to the operation of the order, that these services benefit all producers, and that

the cooperatives give full *quid pro quo* for the payments which they receive (*supra,* pp. 12–14).

Although the findings on which we rely were made in conjunction with the 1953 amendment to the order, they were based on evidence showing the conditions existing in the market and milkshed prior to the administrative hearing held in January and February 1953 (R. 2112). The findings set forth long-standing marketing conditions in this milkshed, and are as applicable to the period from March 1952 (when this action was instituted) to December 1953 as to the period subsequent to December 1953.

We submit that, under the findings, the provisions of the New York order for payments to cooperatives are consistent with and relevant to, and serve to effectuate, the terms and conditions of Section 8c (5), as that section was construed in relation to payments to cooperatives in *Brannan* v. *Stark.* What was there held was that when a cooperative receives payment out of the producer settlement fund on account of services rendered only to its members, they thereby get these services free and, in effect, receive a higher price for their milk than nonmembers, contrary to the command of Section 8c (5) (B). On the same reasoning, if a cooperative performs services benefiting all producers alike and only its members bear the cost of this service, they receive *less* for their milk than nonmembers, contrary to the command of 8c (5) (B). Payment to the

cooperative out of the producer settlement fund equally distributes the cost of the service among all producers and accordingly effectuates what 8c (5) (B) requires, that a uniform price be paid to all producers.

The New York order requires genuine, not *pro forma,* market-wide services. Under the 1953 amendment payment is made only to a cooperative or federation of cooperatives having not less than 4,000 members, with an additional payment to a cooperative or federation having not less than 6,000 members (App. 15–17). The reasons for these minimum-membership provisions are set forth in the Secretary's findings. He found that the required market-wide services can be performed more effectively and at less expense by a large organization able to hire well qualified experts and to undertake extensive research; that such an organization, having members with diversified interests, is more representative of producers as a whole; and that a small cooperative could retain its identity and participate in the marketing program by federating with other cooperatives (R. 117).

We have discussed the provisions of the marketing order in effect subsequent to December 1953 for the purpose of showing that the decision below sustaining the validity of these provisions is not in conflict with the decision of this Court in the *Stark* case. We think it equally clear that the decision below, as it applies to the

provisions in effect prior to December 1953, is also not in conflict with the *Stark* decision.

The services required of cooperatives prior to the 1953 amendment primarily related to the milk marketing problems growing out of the seasonal character of milk production. Herds sufficient to meet the demand for fluid milk during winter months produce much more than enough to satisfy demand during summer months, and to prevent reduction of herds below the point necessary to supply demand in the season of low production, there must be an outlet, through manufacture of milk products, for "surplus" milk in the period of flush production. *Stark* case, 342 U. S. at 460.

Under the New York order in effect until December 16, 1953, payment was made only to cooperatives "arranging for and supplying, * * * in times of short supply, Class I milk to the marketing area", and "securing utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers" (App. 10).[12] In the *Stark* case this Court called attention to the fact that the Boston order contained

[12] The order, as amended in 1953, likewise imposes the latter requirement. It provides that the market administrator shall wholly or partly disqualify a cooperative, and that payments to it shall not thereafter be made, if he determines that it has failed, promptly after his demand, "to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification" (927.76 (g) (1) (iii), App. 23–24).

no like requirements, observed that their omission "presumably was deliberate", and emphasized that "the cooperatives in the Boston area were unwilling or unable to perform services such as those required by the New York Order." 342 U. S., note 12 at p. 461. This Court, having itself distinguished the facts on which it based its decision in *Stark* from those in the instant case, validation of the New York order and invalidation of the Boston order does not involve a conflict in decision.

In the present case the court below said that the requirements of the New York order which were referred to in the *Stark* opinion as standing in contrast with the absence of like requirements in the Boston order "are essentially retained and even made more specific by the 1953 amendments to the Order" (App. 37). The court below also said that "the 1953 amendments made no material change" in the prior requirement of the New York order that cooperatives "dispose of milk in such a way that all producers will benefit" (App. 38). The court below further said in this connection: "The Secretary found that the cooperatives perform a marketwide service in acting so as to assure the most desirable class utilization of milk, and the statements made by the Supreme Court in the *Stark* case indicate it would concur in that view" (*ibid.*).

II

Petitioners contend that, if this case is not governed by *Brannan* v. *Stark*, it presents an important question of federal law which has not been, but should be, decided by this Court. But what the case essentially involves is the application of the statute to particular provisions of a particular marketing order under particular findings of fact.[13] Not only did the Secretary find that the conditions and problems related to and affecting the New York order are "unique" (*infra*, p. 34), but the New York order is the only one of 64 outstanding milk orders providing for like payments to cooperatives.[14]

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[13] The pertinent provisions of the order cover some 16 pages as printed in the appendix to the petition for certiorari (App. 10–26). The findings of the Secretary as printed in the appendix to this brief cover 41 pages.

[14] In the *Stark* case this Court noted that of 39 then outstanding milk orders only four (including the Boston and New York orders) contain "provisions of the general nature of those in question." 342 U. S., note 19, p. 466. Following the *Stark* decision, the Secretary terminated the cooperative payment provisions of three of these orders (those of Greater Boston, Cincinnati, and Dayton-Springfield) upon the ground that they were governed by the decision in the *Stark* case (R. 3168–70). At the same time he announced that he would not terminate the cooperative payment provisions of the New York order, for the reason that he had been advised by the Solicitor General of the United States and the Solicitor of the Department of Agriculture that, because of the "substantially different conditions of eligibility" under this order as compared with the Boston order, the provisions of the New York order were not invalidated by the *Stark* decision (R. 3168).

We have here administrative action bearing every indicium of careful and tempered consideration, taken in the light of the principles which this Court laid down in *Brannan* v. *Stark,* and based in major part on recommendations resulting from a study made by a committee of recognized, disinterested experts. The case comes before this Court following decision by both the district court and the court of appeals that the administrative action complies with the law and is not in conflict with the *Stark* case.

III

Petitioners contend that, in any event, the contested provisions of the order are not authorized by the statute. The basis for this contention seems to be that, because Section 8c (5) contains certain specific directions or requirements as to milk marketing orders, but is silent as to provisions of the kind here involved, the Secretary is impliedly prohibited from adopting these provisions pursuant to the authority given him by Section 8c (7) (D), to include in a marketing order terms and conditions "necessary to effectuate the other provisions of such order."

Even a cursory examination of the New York order, which occupies 38 double-column pages as printed in the Code of Federal Regulations (7 C. F. R. 927.1–927.353), shows how elaborate, detailed and varied the provisions of this order are. Yet authority for the order rests primarily

on Section 8c (5) of the Act, which is set forth in less than three pages of the appendix to the petition for certiorari (App. 2–4). Congress has framed in general terms the policy to be pursued and has left to administrative action the task of implementing this policy. While the administrator of the Act must stay within the confines of the course charted by Congress, he must be allowed reasonable flexibility in choice of means for effectuation of the statutory provisions. See *United States* v. *Rock Royal Cooperative,* 307 U. S. 533, 574, 575–576; *Queensboro Farm Products* v. *Wickard,* 137 F. 2d 969, 979 (C. A. 2); *Green Valley Creamery* v. *United States,* 108 F. 2d 342, 345 (C. A. 1).[15]

The findings of the Secretary show, perhaps even redundantly, that the provisions of the order for payment to cooperatives are "necessary to effectuate the other provisions" of the order. If, therefore, we are correct in believing that these provisions do not run counter to any prohibition of the Act (see Point I, *supra*), they clearly fall within the authority conferred upon the Secretary by Section 8c (7) (D).

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[15] In the *Green Valley* case the court said that the Act "does not specify the detailed method by which a blended or uniform price is to be computed", and it held that a required adjustment in computation of uniform price is valid if it appears to be "reasonably adapted to promoting the successful operation of the equalization pool".

CONCLUSION

The decision below is not in conflict with *Brannan* v. *Stark* and it turns on administrative action, based upon detailed administrative findings, which have been reviewed and found to be valid by two lower courts. It is respectfully submitted that the petition for writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

ROBERT L. FARRINGTON,
General Counsel,
NEIL BROOKS,
Assistant General Counsel,
Department of Agriculture.

MARCH 1956.

APPENDIX

The following is the Decision by Ezra Taft Benson, Secretary of Agriculture of the United States, with respect to the cooperative payment provisions, for market-wide services, filed on October 7, 1953 (18 F. R. 6458 *et seq.*):

Preliminary Statement

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 *et seq.*), and the applicable rules of practice and procedure, as amended, governing proceedings to formulate marketing agreements and marketing orders (7 CFR Part 900), and in accordance with the notice of hearing issued on December 24, 1952 (18 F. R. 43), a public hearing was held at Syracuse, New York, on January 22–23, 1953, and on February 16–21, 1953, upon certain proposed amendments to the tentative marketing agreement and to the order, as amended, regulating the handling of milk in the New York metropolitan milk marketing area (7 CFR 927.1 *et seq.*).

The hearing was held with respect to whether the milk marketing order, as amended, for the New York metropolitan marketing area should continue to provide payments, from the producer-settlement fund, to co-operative associations of producers for market-wide services, and, if so, the changes, if any, which should be made in the present provisions of the order, as amended, under which the payments are

authorized for market-wide services. A marketing agreement has never been executed with respect to this program but the hearing relates also to the provisions in the tentative marketing agreement that are comparable to the co-operative payment provisions in the order, as amended. The term "order," as used in this decision, means the order, as amended, regulating the handling of milk in the New York metropolitan milk marketing area (7 CFR 927.1 *et seq.*) pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 *et seq.*).

The transcript of the testimony at the hearing consists of more than 1700 pages and numerous exhibits. Subsequent to the hearing, some of the interested parties filed with the Hearing Clerk proposed findings and conclusions and written arguments or briefs with respect to the evidence adduced at the hearing.

Rulings

Upon the basis of the evidence introduced at the hearing and the record thereof, the Assistant Administrator, Production and Marketing Administration, on August 17, 1953, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision in this proceeding. The notice of filing of such recommended decision and opportunity to file written exceptions thereto was published in the Federal Register on August 21, 1953 (18 F. R. 4998). The rulings contained in the recommended decision on the proposed findings and conclusions submitted by interested parties are hereby confirmed.

Careful consideration has been given to all of the exceptions filed in this proceeding, and these exceptions, together with requested findings and conclusions associated therewith, are hereby denied to the extent to which they are at variance with the findings and conclusions herein set forth.

One exception relates to whether the Secretary's decision should be "final" with respect to a ruling by the Market Administrator on the qualification or disqualification of a co-operative or federation. A slight change has been made to make it clear that the Secretary's decision, in that respect, constitutes final administrative action and that judicial review, if such is appropriate and available, is not precluded and may be obtained in accordance with the appropriate procedure, including a petition under Sec. 8c (15) (A) of the statute if such is requisite to judicial review.

It is asserted in some of the exceptions that the decision of the Supreme Court in *Brannan* v. *Stark,* 342 U. S. 451, precludes payments to co-operatives for market-wide services, such as those provided for in the amendment to the order as set forth in this decision. But the Court's opinion in *Brannan* v. *Stark* relates to an order in another market, and the evidentiary facts and provisions in that case are significantly different, in various respects, from those involved in this rule-making proceeding. It is concluded, after careful consideration of that case, that the provisions for co-operative payments for market-wide services, as provided for in the amendment to the order as hereinafter set forth, are authorized by the statute and are supported by

the extensive and strong record of the evidence in this proceeding.

Some of the exceptions relate, in general, to the evidentiary foundation for findings that were set forth in the recommended decision. These exceptions, as well as all other exceptions, have been carefully considered in the light of a review and study of the record of the hearing. The findings hereinafter set forth are in such detail as to reveal our resolution of all these issues.

Findings and Conclusions

The following findings and conclusions have been arrived at after a careful review and consideration of the record of the hearing, the briefs, including the proposed findings and conclusions, and the exceptions; and all the following findings and conclusions are based on the evidence adduced at the hearing. The findings and conclusions are in detail so as to reveal and include the reasons or basis for the findings and conclusions with respect to all of the material issues of fact, law, or discretion presented on the record of the hearing. The findings and conclusions are as follows:

The regulatory program for the New York metropolitan marketing area is a joint Federal-State program. The Federal order and the State order are complementary, and both orders contain, in all material respects, identical provisions. In the case of the original promulgation of the orders, and each amendment to the orders, joint hearings have been held and the amendments to both orders have been identical in all material respects. This program has been administered in accordance with the principles of procedure set forth in the agree-

ment or memorandum of understanding executed on August 26, 1938, by the Secretary of Agriculture of the United States and the Commissioner of Agriculture and Markets of the State of New York.

Several months prior to the hearing, the United States Department of Agriculture and the New York State Department of Agriculture and Markets appointed a committee of experts, in the field of milk marketing, to make an independent study of co-operative associations of producers in relation to the Federal-State milk marketing order for the New York metropolitan area. G. W. Hedlund, Professor of Business Management and Acting Head of the Department of Agricultural Economics, New York State College of Agriculture, served as chairman of the Committee. Dr. Hedlund is a specialist in the field of co-operative organization. The other members of the committee are Thurston M. Adams, Acting Associate Dean and Director, University of Vermont and State Agricultural College; C. A. Becker, Professor of Agricultural Business Management, Pennsylvania State College; L. C. Cunningham, Professor of Farm Management, New York State College of Agriculture; Steward Johnson, Professor of Agricultural Economics, University of Connecticut; C. W. Pierce, Professor of Agricultural Economics, Pennsylvania State College; Leland Spencer, Professor of Marketing, New York State College of Agriculture; Herbert G. Spindler, Assistant Research Professor, University of Massachusetts; R. P. Story, Assistant Professor of Marketing, New York State College of Agriculture; and Allen G. Waller, Chairman, Department of Agricultural Economics, Rutgers

University and Agricultural College. The members of the Committee are economists and marketing specialists and are familiar with milk marketing and its various problems throughout the milkshed for the New York metropolitan area

The subject before the Committee for investigation and study was given careful attention by the Committee. The Committee began its work by reviewing the relevant background material, including the provisions of the order, the records of the promulgation hearings on which the provisions of the order are based, and other related data. The Committee then outlined the services performed in the marketing of milk and considered three questions, viz: (1) What agencies or groups perform each service; (2) does a particular service benefit all producers or are the benefits confined to the membership of a co-operative association of producers; and (3) should a co-operative be paid, from the producer-settlement fund, for market-wide services performed by such co-operative. After the Committee had familiarized itself with all of the background material and had studied, among other things, the services by co-operative associations of producers, the Committee issued a public invitation to interested groups and persons, including those opposed to co-operative payments, to meet with the Committee. The Committee received many points of view and ideas from the various groups or segments of the industry. The Committee held numerous meetings for discussion and study, and two of the meetings were for a session of three days, two meetings were for a session of two days, and various meetings were for one day.

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The conclusions and recommendations of the Committee were submitted in evidence at the hearing, and various members of the Committee attended the hearing and testified. All of the members of the Committee are experts in this field, and their qualifications were not challenged at the hearing. A large part of the record consists of the testimony and supporting data submitted by the members of the Committee. Additional evidence was adduced by co-operative associations of producers, by handlers, and by producers who are not members of a co-operative association of producers.

Price-fixing under the milk order for the New York metropolitan marketing area is not static but requires constant attention and frequent hearings on proposed amendments. Also, marketing conditions require at times the suspension or termination of some of the provisions in the order. During the period from September 1938 to December 1949 more than 200 changes were made in the regulatory provisons of the order, and those changes were on 53 different occasions. Since December 1949 the order has been further amended at times and numerous changes made effective. Amendment hearings generally deal with involved and complex issues, and the records of such hearings are voluminous.

The milk supply for the New York metropolitan marketing area—the handling of which is regulated by the order—is produced by approximately 50,000 dairy producers located throughout a production area which includes portions of six states, and this milkshed extends more than 400 miles from the marketing area. The 50,000 individual producers are not generally situated so as to attend the numerous

and protracted hearings, and also individual producers do not have available the technicians and data necessary to an effective representation of their interest at such hearings. An individual producer is not able, with his limited means, to maintain the necessary staff to keep informed of current market conditions, initiate requests for amendatory action deemed necessary in the interest of producers, and be alert and informed with respect to the constantly changing circumstances in this highly complex field of milk marketing. It is not to be expected that an individual producer, with his limited means, would be able to represent himself effectively at amendment hearings or to submit relevant evidence in a comprehensive way with respect to the variable and diverse situations that arise, sometimes on short notice, and which must be met with dispatch by way of amendatory action. For example, the failure to amend class prices which are out of line with current market conditions results in the utilization of milk in uses which do not render the most favorable return to the producers, in the market-wide pool, who receive, under the Act and the order, a uniform blended price. If, as an illustration, the Class III price for milk is too high, ice cream manufacturers may discontinue the use of cream and use butter instead, which would return to producers, under the present order provisions, 14 cents per hundredweight less for their milk. But a small decrease in the Class III price might induce the ice cream manufacturers to use cream, and as a result all producers would benefit by the utilization of the milk in the manner most profitable to the producers under a market-wide pool whereby a

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uniform blended price is paid to producers for their milk. Although individual producers seldom attend the hearings or actively participate in the hearings in an effective way, nonetheless the vigorous and well organized co-operative associations of producers give constant attention to the various marketing and economic problems in the industry, and by active participation in the hearings and in other activities day by day in the operation of the program contribute, in significant and far-reaching respects, to the solution of the problems that must be resolved.

The factors of size, diversity of conditions, specialization among handlers, divergency of interests, and complexity of price structures make this milkshed and regulatory program unique. In recent years the value of milk priced under this program for the New York metropolitan marketing area has exceeded $300,000,000 annually. The volume of milk priced under the program approximated 7,000,000,000 pounds in 1952, or about ⅓ of all the milk regulated under the Federal programs regulating the handling of milk in most of the major metropolitan areas of the United States. This large volume of milk under the order is produced on farms in New York, New Jersey, Pennsylvania, Vermont, Connecticut, and Massachusetts. The area from which such milk is drawn is not a sharply chiseled and segregated milkshed but is overlapped and interlaced with the milksheds of the major cities in the northeast. Moreover, the milksheds for many large cities in the State of New York are wholly contained within the milkshed for the marketing area defined in the order. The overlapping of these milksheds causes compli-

cations in pricing and supply which are not present to the same degree elsewhere in the United States.

The wide range of conditions and interests in this extensive milkshed and the large volume of production and marketing of milk emphasize the pronounced need for active producer participation in this regulatory program. Inasmuch as the interests and viewpoints of the proprietary handlers —a small group—are always well represented at the hearings and in the other activities under this program, the absence of an alert and informed participation by the producers would give to the program a one-sided character that would, under the circumstances, preclude the attainment of the statutory goal. Moreover, the public has a direct interest in the proper formulation and administration of this regulatory program, and this public interest may be maintained only if all relevant market facts and circumstances are promptly developed and the large producer group is effectively represented in the functioning of the program.

Proper regulation may be made effective and maintained in effect only if the facts are fully and promptly developed and presented. This cannot be done in the absence of alert and informed participation by producers. This activity by producers is time consuming and expensive. In sharp contrast to some industries the dairy industry in this milkshed consists of thousands of relatively small producing units, *i. e.*, dairy farms, and the marketing of milk in this milkshed requires of necessity the consideration of a complex array of changing factors, such as sudden changes

in the supply and demand for milk caused by the weather.

Inasmuch as the provisions of the order must be based on the evidence adduced at a public hearing and the order must be amended from time to time to be relevant to current marketing conditions so as to effectuate the economic goal set forth in the statute and thus be in the public interest, it is of basic importance for there to be producer participation in the formulation and operation of the order and the amendments thereto to the end that the program may be predicated on a broad and comprehensive foundation and thereby provide for such regulation as may attain the Congressional purpose. Producer participation in the program is also conducive to an informed and proper consideration by the producers in the referenda under the statute. Alert and informed producer participation is essential throughout the entire regulatory process in this market, *e. g.*, in discerning the need for amendatory action and in making requests for amendment hearings, in participation at the hearings, in participation in the referenda among producers as to whether the program meets with the requisite producer approval as specified in the statute, and in the numerous and varied functions day by day in the marketing of milk, including in some instances requests for suspension or termination of certain regulatory requirements. Also, the producer groups should be prepared to present evidence on short notice at industry meetings, relative to the "call" provision, under Sec. 927.24 (g) of the milk order. Under this provision, the Market Administrator may, in designated circumstances, conduct an industry meeting for

the purpose of determining whether the market is adequately supplied with fluid milk and cream. If the Market Administrator determines that the market is not adequately supplied, he may require pool handlers to supply the market with fluid milk and cream. At such hearings, some fluid milk handlers may be motivated to contend that the market needs fluid milk, while at the same time the proprietary handlers engaged in manufacturing may be motivated to contend that there is an adequate supply of fluid milk and cream so that they can continue manufacturing milk products. The producer groups must be prepared, day by day, to give detailed evidence as to the market situation so that the total milk supply will be properly utilized, and result in the greatest return to all producers under the market-wide pool. In addition, producer participation is necessary at the public meetings called by the Market Administrator to consider rules and regulations for issuance under the order.

Active participation by producers in the regulation of milk marketing is feasible only by means of co-operative associations of producers. The dairy industry in this milkshed has had considerable experience with organizations or groups of producers operating as co-operative associations of producers since 1916. Prior to September 1, 1938, when this regulatory program became effective, collective bargaining between co-operative associations of producers and handlers was an accepted method for determining the price of milk. In addition, some co-operative associations have operated and continue to operate milk plants for handling surplus milk. The

order provides, among other things, for producers to receive a uniform minimum price for their milk, and after the order had been in effect for a fairly long period of time the tendency developed among some producers to regard the functioning of the order as an automatic operation. The producers, as a group, tended to withdraw support from the co-operative associations which spent time, effort, and money in protecting and fostering the interest of all producers in the milkshed. Also the general trend in recent years toward higher prices has caused some decrement in producer recognition of the need for strong co-operative associations of producers. The three principal organizations of producers in the milkshed now represent about 60% of all producers. But in 1940 one organization had as high a percentage of producers in its membership. The percentage of all producers in co-operative associations in the milkshed has decreased from 73.9% in 1940 to 70.4% in June 1952, and the percentage of all producers in federated co-operatives has decreased from 61% to 50.5% during the same period. The total number of co-operatives in the New York milkshed has decreased from 110 in 1940 to 91 in June 1952, and the number of such co-operatives qualified to receive co-operative payments under the New York order has decreased from 84 to 73 during that period. More than 14,000 producers—about 30% of the producer group in the milkshed—do not belong to any co-operative association of producers. The non-participating producers constitute a larger percentage of the total number of producers than they did when the order

became effective in 1938. The following synoptic table shows the number and membership of all co-operative associations of producers in the New York milkshed as of January 1940 and June 1952:

Group	Number of co-operatives		Number of members		Percent of all producers	
	Jan. 1940	June 1952	Jan. 1940	June 1952	Jan. 1940	June 1952
FEDERATED						
Bargaining	49	45	13,691	7,123	22.9	14.4
Bargaining & collecting	4	3	872	423	1.5	.9
Operating	13	20	21,946	17,426	36.6	35.2
Total federated	66	68	36,509	24,972	61.0	50.5
UNAFFILIATED						
Bargaining	18	5	3,585	6,239	6.0	12.6
Bargaining & collecting	2	1	268	78	.5	.2
Operating	24	17	3,850	3,523	6.4	7.1
Total unaffiliated	44	23	7,703	9,840	12.9	19.9
ALL CO-OPERATIVES						
Bargaining	67	50	17,276	13,362	28.9	27.0
Bargaining & collecting	6	4	1,140	501	1.9	1.0
Operating	37	37	25,796	20,949	43.1	42.4
Total co-operatives	110	91	44,212	34,812	73.9	70.4
Members of union-type organizations who were not members of co-operatives			15,627	1,402	26.1	2.8
Unorganized producers				13,265		26.8
All producers			59,839	49,479	100.0	100.0

In 25 milk markets throughout the country the percentage of all producers represented as of December 1951 in the co-operatives ranged from 39% to 100%. In 9 of the 25 milk markets more than 90% of the producers belong to co-operatives. The New York milkshed is one of the 9 areas in which less than 75% of the producers are members of a co-operative. Also in 9 of the 25 milksheds more than 80% of the producers are members of the largest co-operative. But the New York milkshed is one of the areas in which the membership of the largest co-operative comprises less than one-third of the pro-

ducers. In the New York milkshed the largest federation of co-operatives—including the largest co-operative in the milkshed—has in its membership only about 40% of the producers.

The relative strength of co-operative organizations and federations of co-operatives has declined somewhat since the New York milk order became effective in 1938. It appears that the present co-operative payment provisions of the order have been helpful, but have not entirely prevented this trend. The performance of essential market-wide services for the benefit of all producers in the market requires strong and vigorous co-operative associations or federations of co-operatives. The present provisions of the order providing for such payments should be improved and strengthened in various respects. Without co-operative payments the cost of the market-wide services rendered by co-operative associations and federations must be borne exclusively by their members, resulting in an unfair disparity between members and non-members. The impact on members of paying the cost of such market-wide services tends to discourage membership in co-operatives, and that tendency or discouragement thus impairs or prevents the development of the only means by which producers can be represented effectively. A failure to pay co-operative associations for services benefiting all producers would be contrary to long established public policy to encourage the development and expansion of co-operative associations of farmers as reflected in the relevant Acts of Congress, and to pay co-operatives, in the manner provided in the amendments

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contained herein, for services which they render in the interest of all producers is consistent with that established public policy.

Any payments to co-operatives for the performance of market-wide services should be borne equally by all producers and not merely by producers who are members of a particular group. Members of the participating co-operatives and nonmembers have equal interests in the producer-settlement fund, and their contribution to the cost of these market-wide services should be the same. All producers receive the value of such market-wide services, and all producers should, under this regulatory program, pay for them on the same pro rata basis without regard to whether or not they happen to be members of the co-operative associations which are performing the services. The situation is the same as would be the case if there were available some other equally qualified agency which could be engaged to perform the necessary services. Accordingly, payments should be made to co-operatives out of the producer-settlement fund for the performance of the market-wide services contained in the amendments set forth in the decision.

The members of the co-operatives are distributed throughout the entire milkshed, and the co-operatives are of various types and sizes. Some of the co-operatives operate milk plants, and others do not. To the extent that producers' interest in the classification, pricing, and pooling provisions of the order may differ, such differing interests are represented by the co-operatives and their members. The co-operatives include vast numbers of producers

whose interest in the order and in the milk marketing problems associated therewith is the same as the interest of producers otherwise similarly situated and interested but who are not members of co-operatives. Co-operatives as a group can and do represent the interests of producers generally in the various activities associated with the order which are necessary to its continuing effectiveness and to the protection of producer interests therein. The order applies to and benefits all producers, and not merely producers who are members of co-operative associations. The services which co-operative associations can and do perform in connection with the formulation and proper functioning of the order are necessary services which are of distinct and far-reaching benefit to producers who otherwise would be without effective representation.

The co-operative associations generally carry on many kinds of activities which are of market-wide value in the milkshed. These market-wide services by co-operative associations include: (1) analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the Market Administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and pres-

entation of evidence at public hearings, the submission of appropriate briefs and exceptions and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participating in the meetings called by the Market Administrator with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data and briefs for submission; (5) conducting a comprehensive educational program among producers—members and non-members of co-operatives—and keeping such producers well informed for participation in the regulatory program, and as a part of such program by issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend.

In addition to the foregoing services of market-wide character by co-operative associations of producers, some of the co-operatives, generally identified as operating co-operatives, perform market-wide service with respect to the maintenance of manufacturing plants for surplus milk. In this milkshed, with its wide seasonal and cyclical variations in supply, it is necessary to have these plants in order to insure an outlet for the milk produced for disposition as fluid milk in the marketing area. In order to avoid shortages during some of the time, it is necessary that the supply of milk for the marketing area should at all times exceed the minimum requirements of the fluid milk market. Whatever the minimum safety margin

may be, it is not possible to maintain that minimum in the fall and winter months without exceeding it in the spring and summer months owing to the seasonal variation in milk production. This economic imbalance in the production and marketing of milk presents a serious problem with respect to assuring an adequate supply of fluid milk throughout the year and of equitably disposing of the surplus milk. The order applies only to milk that handlers are willing to and do accept, and if producers are denied an outlet for their milk by proprietary handlers then the producers are faced with the uneconomic choice between dumping their milk or reducing their herds, unless outlets for their milk are provided by the co-operatives. Manufacturing facilities should be available to handle the surplus milk that cannot be utilized on the fluid milk market. Manufacturing facilities required to handle the surplus milk are not ordinarily required at other times of the year, and are maintained as standby facilities. These operations of manufacturing plants take care of both seasonal and week-end surpluses, and the operations include of necessity the storage and handling of dairy products manufactured from the surplus milk. Operating co-operatives have constructed and maintained these plants which are generally operated more intermittently and at greater financial burden than similar plants that are operated by proprietary handlers. The financial burden for maintaining these facilities for the disposal of surplus milk is a major handicap to some co-operatives.

The problem of surplus milk can, in some respects, be met by means of class pricing but in view of the rapidly changing

conditions in the market it is not possible to solve this problem solely by means of class prices. The market-wide services thus performed by maintaining plants for surplus milk could under some circumstances be performed by proprietary handlers who may be willing to perform this service. But the record of this hearing does not warrant a finding or conclusion that payments should, in this respect, be made to proprietary handlers. The subject is, however, one for further consideration, and may be presented at another hearing whenever appropriate. The payments to co-operatives, as provided for in the amendments hereinafter set forth, are the appropriate and necessary payments for the market-wide services which are performed only by co-operatives, and these services are necessary under the circumstances revealed in the record.

Co-operative associations of producers also perform a market-wide service in disposing of their milk so as to result in the highest net return to the pool, *i. e.*, producer-settlement fund. Of necessity the order fixes different class prices for the different uses of milk. Because the relationship of these class prices is not always in perfect balance due to rapidly changing market conditions, handlers may at times realize a greater margin of profit by using milk in the lower valued class uses as compared to the more valuable utilizations. By reason of the cooperative payment provisions which are presently in the order co-operatives have channeled the milk under their control into the utilizations most advantageous to the pool despite the loss to them of such greater profit margins, and the total value of the pool has been thereby

enhanced to the advantage of all producers. This market-wide service by the co-operatives is performed whenever their milk is thus disposed of in a higher priced class if, in fact, there is a market for milk in that higher utilization class without "bumping" other pool milk into a lower class.

The present co-operative payment provisions of the order require each participating co-operative, on its own initiative, to assure that the milk handled or controlled by it flows into and is utilized in channels that yield the highest net available return to the pool, *i. e.*, producer-settlement fund, and consequently to all producers. In actual application the co-operatives, and particularly the smaller bargaining co-operatives, have encountered some difficulty in ascertaining whether the utilization of their milk is in the class utilization which would give the highest overall return to the producer-settlement fund, and compliance with the present provisions by the participating co-operatives appears to have resulted at times in displacing other producer milk in the higher class utilizations without actually achieving a higher net utilization for the pool, while at the same time causing some unnecessary costs and shifting of normal uses of particular milk.

It was suggested during the hearing that better class pricing would more effectively solve this problem. But no milk pricing mechanism will automatically or constantly maintain the desirable relationships between class prices and bring about the most desirable utilization at all times, and no such device or method is available for the future. Accordingly, the provisions for co-operative payments for market-wide

services are necessary in view of the characteristics of the market, to achieve the goal of this program under Sec. 8c (18) of the statute.

Although the co-operatives and federations receiving the payments will be expected to keep a constant watch on relative class prices and to take prompt action to assure that appropriate amendatory or other action be proposed to restore proper pricing balances as soon as possible, amendments to the New York order cannot ordinarily be made effective without some delay. Some pricing disparities, by their very nature, are temporary, so that amendment of the order would not be feasible. A provision which would require co-operatives or federations to act in a practicable way to assure the most desirable class utilization of milk would provide interim protection to the pool until such disparities disappear or can be corrected.

Although the 1945 amendments to the order required pool handlers, in designated circumstances, to supply fluid milk and cream, such "call" provisions in Sec. 927.24 (g) of the order do not fully meet the problem of achieving the most desirable utilization of milk. The basic purpose of the call provisions is to assure a sufficient supply of fluid milk and cream to the market. Because of the complexities of the problem, the call provisions have been specifically limited to certain fluid milk and fluid cream classes, and do not cover all aspects of desirable utilization. Specified procedures also must be followed before the call milk provisions can be put into effect, leaving some inevitable time lags. In addition, the maximum percentages fixed for all pool plants with respect to speci-

fied class uses would not necessarily represent the total potential demand in each of such classes. Consequently, even in the limited field of "call milk" room remains for action by co-operatives to insure utilization most advantageous to the pool, *i. e.*, the producer-settlement fund.

The co-operative payment provisions, in that respect, appear to have worked somewhat automatically or unobtrusively and have substantially accomplished the purposes for which they were designed, although not always perfectly. It is concluded, however, that the same net result can be accomplished, while avoiding the undesirable incidental or side effects of the present provisions, by cutting off payments to participating co-operatives which persist in arranging for undesirable utilizations of their milk after having been called on by the Market Administrator to correct the practice. A co-operative which persists in utilizing milk in a lower use value after receiving notice of an unfulfilled market demand for milk in a higher value use is engaging in marketing activity that is inimical to the interest of the entire producer group in the market-wide pool provided for by this order, and any such co-operative should be precluded from receiving co-operative payments, from the producer-settlement fund, for thus failing to dispose of its milk in the highest use value for which there is an unfulfilled market demand.

In order to function properly in rendering the various market-wide services a co-operative should have a well established program administered by a staff of trained specialists. A budget of substantial size is necessary. The required market-wide

services can be rendered more effectively and at less expense to the producers, in general, by a few large co-operatives or federations of co-operatives than by numerous small organizations. A large organization is able to hire larger and better qualified staffs of experts than a small group and a large organization is able to undertake more extensive research projects than a small group is able to undertake. A large organization represents the views of its diversified membership and is able to provide the necessary facilities and competent personnel to deal effectively with the problems confronting the producer group. A small co-operative may, under some circumstances, render services of market-wide character, but the present-day needs and complexity of this great milkshed are such that, for practical purposes, co-operative payments from the producer-settlement fund should be limited to co-operatives or federations of co-operatives that meet the minimum size requirements established in the amendments to the order as later set forth in this decision.

Any co-operative or federation of co-operatives that has at least 4,000 producer members and in the various other respects also meets the criteria set forth in the amendments to the order, as later set forth in this decision, should receive from the producer-settlement fund a payment of 2c per hundredweight of milk marketed during each month by the producer members of such group. Although a smaller co-operative or federation may, under some circumstances, render services of market-wide character, nonetheless the complex attributes of this milk market are such that, as a practical matter, a co-operative

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or federation should, for this purpose, have at least 4,000 producer members so as to be able to maintain a staff and facilities requisite to the performance of the necessary market-wide services. Co-operatives that cannot individually qualify under the requirement for at least 4,000 producer members may federate, and by means of the federation perform market-wide services so as to qualify for payments to the federation under the amendments to the order as set forth in this decision.

As a co-operative or federation increases in size its services to the market as a whole are of more widespread character and value, and therefore such organization should receive a higher rate of payment than a smaller organization. Co-operatives and federations of more than 6,000 members have their membership distributed among several states in the milkshed, whereas the membership of smaller co-operatives or smaller federations tends to be localized in smaller and more compact geographical areas. The larger organizations are, therefore, inherently better equipped to perform market-wide services, and all producers will benefit more if the larger organizations undertake the more extensive, and costly, market-wide services. Also the cost per member for furnishing market-wide services tends to increase as the co-operative increases in size because of the distribution of membership over widely separated areas. Any co-operative or federation of co-operatives that has at least 6,000 producer members and in the various other respects also meets the criteria set forth in the proposed amendment should receive from the producer-settlement fund an additional payment of 1

cent per hundredweight of milk marketed during each month by such group.

Co-operatives that operate marketing facilities, *i. e.*, pool plants, render services to the market as a whole that are of greater value than the services rendered by non-operating co-operatives. An operating co-operative has more continuous and closer contacts with its members, and also its members have a more extensive and vital interest in the marketing problems in the milkshed than is true of non-operating co-operatives. By virtue of its own marketing functions, a co-operative that operates marketing facilities has first-hand knowledge of the constantly changing conditions affecting the receipt and distribution of milk and milk products. Such co-operative thus has more direct and intimate knowledge of market conditions and developments than a non-operating association and becomes immediately aware of changes in supply and demand, price relationships, and the various other factors of marketing. Operating co-operatives therefore are in a more advantageous position than non-operating co-operatives for discerning the need to change class prices. This is important because the prompt readjustment of class prices to reflect changed economic conditions is necessary to maximize returns to all producers and yet provide an outlet for all of their milk.

Any co-operative that meets the eligibility standards, in the amendments in this decision, and also operates marketing facilities at which is received at least 25 per centum by weight of the milk marketed by its producer members, should receive from the producer-settlement fund a payment of an additional 1c per hundredweight of milk

marketed during each month by the producer members of such co-operative. A federation whose members include operating co-operatives should receive the additional payment of 1c per hundredweight if at least 25 per centum, by weight, of the milk delivered by the producer members of the federated co-operatives is received at plants operated by a co-operative member or members of the federation or at plants, if any, operated by the federation. To comply with the 25 per centum requirement a co-operative or the members of a federation will have to handle not less than approximately 380,000 pounds of milk per day (4,000 [members] times 25 per centum of 380 [average production per day per dairy]). The marketing of this substantial volume of milk will require alertness to, and familiarity with, daily marketing conditions.

The market-wide services, required to be performed in the interest of all producers, will be effectively performed if the co-operatives are paid at the rates set forth in the amendments in this decision. The value to all producers of the performance of the market-wide services will at least equal the amount of the payments to the co-operatives. The co-operatives should, under the amendments, submit budgets which will be carefully studied, and the performance of the market-wide services should be under the constant scrutiny of the Market Administrator. Experience may, of course, reveal the need for revision of the rates. However, under the record of this hearing, the co-operatives should receive payments for the performance of market-wide services in accordance with the rates set forth in the amendments.

The aggregate amount of the payments to co-operatives, under the amendments contained in this decision, cannot be exactly determined inasmuch as it is not known at the present which co-operatives or federations will qualify for the payments, but an adequate basis exists for estimating with reasonable accuracy the maximum amount of the payments to all co-operatives and federations, and the cost per producer, in the milkshed, for the payments to co-operatives and federations under these amendments. The total value of the milk pooled and priced under the New York order in 1951 was $310,292,982. The total amount distributed in 1951 as co-operative payments was $1,273,109, *i. e.*, 4/10 of 1 percent of the total value of the milk pooled. Translated into terms which would project the total expenditures from the producer-settlement fund to producers as individuals irrespective of whether they are members of a co-operative or are non-members, the average individual expenditure to the producers marketing milk under the order in 1951 was slightly over $25.00. If, for example, it is assumed that all of the co-operatives in the milkshed should qualify, separately or as members of a federation, for the payment of 2 cents per hundredweight provided for in the amendments to the order as hereinafter set forth, such payments would amount to $975,000 per year based on the data for 1952. The payments to co-operatives and federations may, in the aggregate, be increased under the amendments by virtue of the additional payment of 1 cent per hundredweight to operating co-operatives and federations and 1 cent per hundredweight additional to any co-operative or federation which has a member-

ship of 6,000 or more. But the aggregate or total of co-operative payments under these amendments, as set forth in this decision, will not be in excess of 1/2 of 1 percent of the total value of the milk pool. The aggregate of these payments from the producer-settlement fund to the co-operatives and federations will represent approximately $25 for each producer in the milkshed, and approximately 70 percent of the producers are members of co-operative associations of producers. The value of the market-wide services, under this complex and intricate regulatory program, is worth more to each producer than the small amount paid to the co-operatives for the performance of the market-wide services. A change, for example, of 1 percent in the uniform price would affect the average annual return of a producer—which in 1951 was approximately $6,300—by more than $60.

The co-operatives incur expenses in the performance of these market-wide services at least equal to the amount thus received from the producer-settlement fund. It is only by means of making these payments from the producer-settlement fund to the co-operatives for the performance of market-wide services that a uniform blended price may be arrived at which will equitably apportion the total value of the milk, purchased by all handlers, among producers and associations of producers on the basis of their marketings of milk during each month which, under the order, is the proper representative period for this purpose. Also, the payments to the co-operatives for the performance of the market-wide services are incidental to, and necessary to effectuate, the classification

pricing, and pooling of milk, and inasmuch as the payments are for the performance of market-wide services the payments are not for milk, but are for services, and thus the blended price which is computed after the making of these payments results in a price which is uniform for all of the milk. The market-wide services and the payments therefor are not inconsistent with the statutory requirement for uniform prices for milk subject only to the variations or adjustments referred to in the statute.

The members of a co-operative or federation should continue, in accordance with the principle heretofore observed under this order, to pay the entire cost of the activities of such co-operative or federation which are not of market-wide benefit. A co-operative receiving payments, or a federated co-operative, under the amendments set forth in this decision should be required to receive from its producer members at least 1¢ per hundredweight of milk marketed by its producer members. That requirement tends to safeguard against a co-operative's depending upon the co-operative payments to finance activities that are not market-wide. If a federation performs activities which are solely market-wide in nature for the benefit of all producers, the federated co-operatives comprising the federation should not be required to make any payments to the federation, except that the Market Administrator's rules and regulations should, among other things, require, whenever necessary to insure the performance of the market-wide services for which the co-operative payments are made, a minimum monthly payment by federated co-opera-

tives to the federation so as to be sure that a federation which receives co-operative payments will fully perform the market-wide services for which the payments are made, and not depend upon co-operative payments to finance activities, if any, that are not market-wide in character.

In order to assure adequate performance of the market-wide services by an applicant for co-operative payments, certain standards are enumerated in the amendments. In order for a co-operative to qualify for payments it should appear that such co-operative is duly incorporated under the co-operative corporation laws of a state; that it is qualified under the Capper-Volstead Act (7 U. S. C. 291 *et seq.*); and that all of its activities are under the control of its members and that it has full authority in the sale of the milk produced by its members. Any such co-operative must have at least 4,000 members who are producers and from whom the cooperative receives not less than 1¢ per hundredweight of milk delivered by the members. In order for a federation to qualify for payments it should appear that such federation is duly incorporated under the laws of a state, and that each of its members is a duly organized co-operative. The federated co-operatives should have an aggregate of not less than 4,000 members who are producers from whom the federated co-operatives receive not less than 1¢ per hundredweight of milk delivered by their producer members. Also, when required by rules and regulations of the Market Administrator the federated co-operatives should pay to the federation the minimum monthly payment specified in the rules and regulations to finance any activities of the

federation that are not market-wide in character.

A cooperative receiving payments should be permitted to affiliate with a federation of other cooperatives, but the membership of the cooperative receiving payments should not be counted for the purpose of determining the size or the amount of payment to be made to the federation. The cooperative payments should be made to the individually qualified cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments. In addition, a federation should have contracts with each of its federated cooperatives under which the cooperatives agree to remain in the federation for at least one year, and such contracts should cover or be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes. These provisions ensure a degree of stability to the federation, and permit it to offer employment incident to the performance of market-wide services for a period of at least one year. These provisions, while preventing double payments, permit cooperatives receiving payment, to give their support and assistance to federations of other cooperatives.

No producer should be counted more than once in determining the membership of the various cooperatives or federations qualified to receive cooperative payments,

and two organizations should not receive payment on the same milk delivered by a producer.

In determining whether a federation of cooperatives is eligible to receive an additional payment of 1c per hundredweight, by reason of receiving at least 25 per centum, by weight, of the milk delivered by members of the federated cooperatives at plants operated by the cooperatives or the federation, the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation claiming or receiving cooperative payments on the same milk, or which is not meeting all of the requirements applicable to it should not be considered. The payment to be made to a federation should be determined only by the milk delivered by producer members of cooperatives which individually meet all of the requirements applicable to them.

A cooperative or a federation may apply to the Market Administrator for payments, and the Market Administrator should make a determination as to whether or not the applicant meets the requirements in the amendments set forth in this decision. For initial qualification the applicant should demonstrate its ability to perform the various market-wide services described in the amendments to the order as set forth in this decision, and any such application should be accompanied by a written plan which details its proposed program for the performance of market-wide services, and the Market Administrator should be satisfied, before approving the application, that the applicant has the requisite personnel,

facilities, and plan for performing the market-wide services, and that such services will be performed.

The performance of market-wide services by the cooperatives or federations that receive payments should be under the constant scrutiny of the Market Administrator in accordance with the provisions in the amendments, in this decision, and in accordance with the rules and regulations to be issued by the Market Administrator. The cooperatives and federations receiving these payments should submit such reports and keep such records as may be deemed necessary by the Market Administrator to enable him to verify whether they are performing the market-wide services, and all such records should be available for inspection and audit by the Market Administrator. The cooperatives or federations that receive payments must perform the market-wide services enumerated in the amendments in this decision, and upon determination by the Market Administrator, after due notice and hearing, that a cooperative or a federation is failing to perform such services the payment should be discontinued by the Market Administrator and the action thus taken should be publicly announced. The proper grounds for disqualification are those enumerated in the amendments, and any cooperative or federation thus disqualified by the Market Administrator may within thirty days after the action thus taken appeal to the Secretary. If no such appeal is taken within that period of time, the action of the Market Administrator should be final. If an appeal is properly perfected, the final administrative decision should be made by the Secretary, but the record on appeal

should be limited to the record before the Market Administrator at the time of his determination. Efficient administration requires that there be a full and complete presentation of all relevant and material facts to the Market Administrator and that such evidence should not be withheld.

The amendments in this decision contain provisions to facilitate and expedite the administration of the provisions which authorize cooperative payments. The Market Administrator should be charged with the responsibility of determining initially whether a cooperative or federation of cooperatives qualifies to receive cooperative payments and also whether it continues to meet the prescribed eligibility and performance requirements. The determination by the Market Administrator should be subject to review by the Secretary upon application therefor by the cooperative or federation. There should be centralized in the Market Administrator the initial responsibility for qualification and disqualification, and no action to disqualify a cooperative or federation should be taken by the Market Administrator until after the cooperative or federation has been notified by the Market Administrator of the alleged failure to meet one or more of the requirements and has been given an opportunity to be heard.

Provision is made in the amendments for the issuance by the Market Administrator of rules and regulations to effectuate the provisions of the order relative to cooperative payments. Broad authority is thus provided for the issuance of rules and regulations. Such regulations should be designed to implement the order provisions and specify in more detail the administra-

tive requirements in connection with the duty imposed on the Market Administrator to make determinations concerning the qualification and disqualification of cooperatives to receive the payments authorized. Rules and regulations for that purpose should be issued only in accordance with the prescribed procedure (similar to that provided in Sec. 927.36 of the order) under which interested parties are provided full opportunity to participate in their formulation. This provision gives a degree of flexibility to the administration of the order provisions and permits the cooperatives and federations to be fully informed as to the administrative practice.

The amendments to the order should provide that, for a period of 90 days after the effective date of the amendments, a cooperative shall receive the same rate of payment for performing the market-wide services as provided in the present order, unless prior to the expiration of the 90 days the cooperative has been qualified under the new amendments. If by the end of the 90-day period, the cooperative has filed an application for qualification under the proposed amendments and if the cooperative continues to perform the market-wide services under the order now in effect, the cooperative should continue to receive the payments set forth in the order now in effect until the application is acted upon by the Market Administrator. The cooperatives are presently performing market-wide services of benefit to all producers, and if the cooperatives continue to perform these services they should continue to receive payments during this transitional period for such services. Under the amendments in this decision, in

order to qualify for payments the cooperatives may have to reorganize and supplement their staffs in addition to other changes which may be required. It may take some cooperatives or federations a reasonable period in order to meet the requirements contained in the amendments and the rules and regulations which are to be issued. It would be contrary to the interests of all producers in the market to be deprived of the market-wide services now performed by cooperatives during this period. In addition, the Market Administrator will have to issue rules and regulations to implement the provisions of the order, and this action by the Market Administrator must, under the amendments, be issued after participation by the industry in public meetings. The Market Administrator will have to give adequate notice of the meetings to the industry so that the industry will have adequate time within which to prepare their evidence and arguments. For example, rules and regulations will be needed to implement the initial qualification provisions, and other provisions, such as those precluding double payment in the event a producer or a cooperative is a member of one or more organizations receiving payments. In order that the Market Administrator may have adequate time within which to issue the rules and regulations, and in order to permit the cooperatives and federations to become familiar with the new amendments and the rules and regulations and to take any other action which may be necessary in order to permit the cooperatives and federations to qualify for payments under the new amendments, the order should contain the

90-day provision set forth in the amendments.

It was suggested at the hearing that in order to foster and encourage the growth of cooperatives and federations for the better performance of market-wide services, the continued eligibility for payment be contingent upon attainment of prescribed increases in membership within specified periods. By providing for an additional payment to cooperatives or federations of 6,000 members or more the desired result will be accomplished by the amendments proposed in this decision. If it should develop that these amendments are inadequate or ineffective, a hearing may be called for the purpose of considering appropriate amendments prior to the expiration of the two-year period suggested at the hearing as the time within which the first increase should be attained.

Other proposals which should not be adopted at this time are those with respect to an additional "matching" payment from the producer-settlement fund and the establishment of an advisory committee to collaborate with and advise the Market Administrator relative to the administration of the cooperative payment provision of the order.

The deduction of additional sums from members to pay for other services is not so directly related to the performance of market-wide services as to justify an automatic increase in the payments from the pool. The rates provided in the proposed amendments should assure the adequate performance of the market-wide services contemplated in this decision. If these rates should prove inadequate, they may

be changed through the amendment process.

The establishment of a formal advisory committee is not necessary, under the amendments, to the effective administration of the cooperative payment provision of the order. The procedure provided in connection with the issuance of rules and regulations should provide adequate opportunity for the participation of producer groups in the development of administrative requirements incident to the cooperative payment provision. Moreover, such groups may at any time submit recommendations and suggestions to the Market Administrator for the more effective administration of this provision.

It was proposed at the hearing that funds for administration of the co-operative payment provision—as distinguished from the co-operative payments—be taken from the producer settlement fund rather than from the administrative assessment fund. Provisions of the act authorizing the issuance of milk marketing orders require that the cost of administering the order be paid from funds derived from a pro rata assessment on the milk received by handlers subject to the order, and the cost of administering the cooperative payment provision of the order is merely a part of the cost of administration required to be financed from the administrative assessment fund.

In addition to the foregoing, it is further found and concluded that:

(a) The marketing agreement and the order, as amended and as hereby further amended, and all of the terms and condi-

tions thereof, will tend to effectuate the declared policy of the act.

(b) The terms and conditions in the amendments are incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of Sec. 8c of the act (7 U. S. C. secs. 608c (5)–(7)) and necessary to effectuate the other provisions of the order.

(c) The terms and conditions in the amendments are necessary in order equitably to apportion the total value of the milk purchased by all handlers among producers and associations of producers, on the basis of their marketings of milk during each month which is the proper representative period.

(d) The terms and conditions in the amendments are necessary to accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in the relevant acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(e) The parity prices of milk as determined pursuant to section 2 of the act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply of and demand for milk in the marketing area, and the minimum prices specified in the marketing agreement and in the order, as amended, and as hereby further amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

(f) The marketing agreement and the order, as amended, and as hereby further amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity, specified in a marketing agreement upon which a hearing has been held.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 697

OSCAR L. GRANT, et al.,
Petitioners,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and
DANIEL J. CAREY, Commissioner of Agriculture and Markets of the State of New York, and
ADAMS PRODUCERS COOPERATIVE, INC., et al., and
METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC.,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF DANIEL J. CAREY, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, IN OPPOSITION TO CERTIORARI

KEITH L. SEEGMILLER
1616 Eye Street, N. W.
Washington 6, D. C.
Attorney for Daniel J. Carey Commissioner of Agriculture and Markets of the State of New York.

Of Counsel:
ROBERT G. BLABEY, Associate Counsel
State of New York Department of Agriculture and Markets
Albany, New York

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OPINIONS BELOW

The opinion of the District Court (R 175-183) is not reported. The opinion of the Circuit Court of Appeals has not yet been reported but has been printed in the Appendix to the Petition (pp. 26-39).

JURISDICTION

The jurisdictional facts are recited in the Petition.

QUESTIONS PRESENTED

1. The question directly involved relates to the authority of the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. The statement of this question in the brief of the Secretary is adopted.

2. A second question potentially in the case is whether this is a class action. Since this will be reached for decision only in the event of reversal of the judgment below, it is not discussed in this brief.

STATUTES AND REGULATIONS

The statutes and regulations pertinent to the points here discussed are set forth in the Appendix *infra* or in full at the place of reference in the text.

STATEMENT

The statement of the case in the brief of the Secretary of Agriculture is adopted.

ARGUMENT

I.

In the interest of avoiding unnecessary repetition, this brief will discuss only one of the several grounds for denial of the Petition, namely, that by reason of the joint Federal-State nature of the regulatory program, the case is distinguishable from *Brannan* v. *Stark*, 342 U. S. 451,

and the decision of the court below is right. On other points, the arguments in opposition to certiorari of the Secretary of Agriculture and of the respondent cooperatives are regarded as fully adequate.

A.

By Reason of the Joint Federal-State Nature of the Regulatory Program Under Attack Here, This Case Is Distinguishable from Brannan v. Stark.

Petitioners have placed almost total reliance upon claimed conflict between the decision of the court below and the decision of this court in *Brannan* v. *Stark*. Largely, their case must stand or fall upon that ground. Of the several important points of difference between the two cases, the joint Federal-State nature of the program involved here but not in the *Stark* case, is the most important from the point of view of the State of New York. Regulation of the milk supply for the New York metropolitan area, including price fixing and equal sharing of marketing costs, is of vast public concern in the State as is plainly shown by Sections 254(a) and 258k, Article 21, of the Agriculture and Markets Law of the State of New York (McKinney's Consolidated Laws of New York, annotated, 1954), which provide in part:

> "The department through the commissioner is hereby vested with the powers * * *, including the following:
>
> "(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York" (Section 254(a) of the State Statute)
>
> "It is hereby declared that the dairy industry is a paramount agricultural industry of this state and the normal processes of producing and marketing milk have become an enterprise of vast economic importance to the state and of vital interest to the con-

suming public which ought to be safeguarded and protected in the public interest; that it is the policy of this state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations; that unfair, unjust and destructive demoralizing trade practices have been and are likely to be carried on in the production, sale, processing and distribution of milk and that it is a matter of public interest and for the public welfare for the state to promote the orderly exchange of commodities and in cooperation with federal government, in its regulation of interstate commerce, to take such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of this state; that for such purpose public interest requires, as necessity therefor has arisen or may arise, the fixing of prices of milk to be paid to producers and associations of producers where there has been or is a disruption of orderly marketing of milk in any marketing area by reason of surpluses or by reason of unfair, unjust or destructive trade practices so that the prices of milk to the producers are or may be below the reasonable costs of production and impair their purchasing power; that in order to make such price-fixing effective it is necessary that the benefits of the fluid market and the burden of, and the expense of, handling of surpluses, be shared equally by all producers of milk for the marketing area and to this end that dealers not handling their proportionate share of the surpluses shall as part of the price of their milk make payments to a fund to equalize the prices of milk to producers and to share the cost of handling surplus so as to remove one of the principal causes of price demoralization." (Section 258k)

The background and purpose of the State regulatory legislation has been outlined and discussed extensively in *Nebbia* v. *New York*, 291 U. S. 502 and *People* v. *Teuscher*, 248 N. Y. 454. In the *Nebbia* case, it was pointed out that "Save the conduct of railroads, no business has

been so thoroughly regimented and regulated by the State of New York as the milk industry". (p. 521) "Under our form of government, the use of property and the making of contracts are normally matters of private and not of public concern. * * * But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at his will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm." (p. 523)

In the *Teuscher* case, it was noted that "More and more, in its social engineering, the law is looking to cooperative effort by those within an industry as a force for social good. It is harnessing the power that is latent within groups, as it is harnessing the power of wind and fall and stream. Conspicuously is it doing this in its dealings with agricultural producers, spread often over wide areas and thus deficient in cohesion, but yielding up new energies when functioning together. * * * We see it in the cooperative marketing associations * * * of recent years * * *, associations with privileges and powers peculiar to themselves." (p. 487)

Cooperative payments which are here challenged have been regarded by the State as sufficiently vital to the New York metropolitan area that they have been expressly provided for in the State statute (Appendix *infra* pp. 14-15). A plan of regulation meeting the requirements of the State policy as prescribed by its statutes has been achieved in the joint Federal-State program. Without continuing Federal cooperation, the present scheme will collapse. Whether the public interest in the state can be served by any alternative scheme not involving federal cooperation is at least doubtful.

Cooperative Federal-State regulation is expressly authorized by both the Federal and the State statutes. The Federal act provides:

"The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 24 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture." (7 U.S.C. 610(i))

The State statute provides:

"The Commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control with states and/or as between states and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders." (Section 258n of the Agriculture and Markets Law of the State of New York; Appendix *infra* pp. 15-16)

Pursuant to these statutory authorizations, the Secretary of Agriculture and the Commissioner of Agriculture and Markets of the State of New York entered into a

Memorandum of Agreement on August 26, 1938 (Appendix *infra* pp. 16-21). This Agreement has continued in effect to the present time. It is a statement of principles of procedure for administering a joint regulatory program for the marketing of milk in the New York metropolitan area. It provides in part:

> "It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders * * * and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders." (Appendix *infra* p. 17)

The nature of the integrated regulatory scheme contemplated by Congress in enacting Section 610(i) *supra* has been described by Mr. Justice Black in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 560, as follows:

> "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their selected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation between New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers."

Following the procedures authorized by their respective statutes and set forth in the Memorandum of Agreement of August 26, 1938, the Secretary and the Commissioner held joint hearings before the initial promulgation in 1938 of orders embodying the now contested provisions for cooperative payments. Orders issued by the Secretary and the Commissioner were based respectively on the record of the joint hearings and were concurrent with and complementary to each other, being identical in all material respects. The effectiveness of each of these orders was conditioned upon the effectiveness of the other. In adopting the order, the Secretary of Agriculture provided:

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary * * *" (3 F.R. 1951)

The order of the Commissioner contains the following provision:

> "NOW, THEREFORE, in cooperation with the United States and its Secretary of Agriculture, and pursuant to the power and authority conferred upon me by Section 258n and other applicable provisions of the Agriculture and Markets Law, and for the purpose of keeping uniform the said joint and concurrent orders;
>
> "IT IS HEREBY ORDERED", etc. (Appendix *infra* p. 24)

In the case of each amendment to the complementary orders after 1938, similar joint hearings were held and upon the records of such joint hearings concurrent and complementary and, in substance, identical orders were issued. From its inception the program of milk regulation in the New York metropolitan area has been administered by a Market Administrator appointed jointly by

the Secretary and the Commissioner, and, by delegation of authority to him, the Administrator has at all times been clothed simultaneously with all of the authority, both Federal and State, conferred by the respective statutes. He does not exercise separately Federal authority part of the time and State authority part of the time; rather, all of his official acts are supported by both. Thus, the regulatory scheme has been tailored exactly to fit the actual traffic in milk which it was designed to regulate. There is a single pool which is neither Federal nor State but joint; and likewise there is a single regulatory program which is neither Federal nor State but joint.

The statute of the State of New York contains an express provision for payments to cooperative associations for marketwide services (Appendix *infra* pp. 14-15). The Commissioner of Agriculture and Markets has held that the payments so authorized by the law of his State should be made as a necessary part of the scheme of regulation and provision for cooperative payments is part of the order which he issued (Appendix *infra* pp. 21-22, 25). To insure that these cooperative payments are in fact made only for market-wide services, he has further required the cooperatives to collect from their members one cent per hundredweight of their milk to pay for other cooperative activities. In this respect, see also the brief of respondent cooperatives at page 6. In support of an order concurrent with and complementary to that of the Commissioner, the Secretary has found that cooperative payments are necessary and that they come within the Federal statutory authorization for order provisions "incidental to, and not inconsistent with, the terms and conditions specified in (5)-(7) and necessary to effectuate the other provisions of such order". (7 U.S.C. 608c (5)D) The Secretary has found, under all of the circumstances shown by the voluminous hearing record in

this case*, including the significant facts that this is a joint Federal-State program and that the State statute expressly authorizes cooperative payments, that cooperative payments are authorized in his order which was issued concurrent with and complementary to the State order.

The Secretary's authority is not limited to his separate and individual regulation of milk under the provisions of Section 608c(5) of the Federal statute. In addition, he is directed, upon request of State authorities, to confer with and hold joint hearings with duly constituted authorities of any State. He is authorized to cooperate with a State in the use of records, personnel and facilities and to issue concurrent and complementary orders (*supra* p. 6). The scope of State authority may be enlarged in circumstances such as those in the present case by reason of Federal consent to State regulation in certain areas subject to Federal regulation (*Whitfield* v. *Ohio*, 297 U. S. 431; *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408). Section 610(i) of the Federal act, referred to above, recognizes a State as well as a Federal area of regulation. In any view of the case, State authority constitutes an integral part of the regulatory scheme so that the subject matter to be dealt with here is in fact a joint program.

Petitioners would eliminate this fact as immaterial. They have not challenged the authority of the Commissioner of Agriculture and Markets to require cooperative payments. Neither have they made any attempt to show that the milk which they produce and sell is beyond the regulatory power of the Commissioner. They seek only to stay the arm of the Secretary as was done in the *Stark* case. However, the power of the arm of the Secretary

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* The record is described in detail in the Statement in the brief of the Secretary of Agriculture.

alone, as in the *Stark* case, is vastly different, we submit, from the concurrent and complementary power of the arms of both the Secretary and the Commissioner of Agriculture and Markets. Assuming, as petitioners contend, although contrary to cogent arguments in the briefs of the other respondents, that the holding in *Brannan* v. *Stark* would under any circumstance prevent cooperative payments by the Secretary acting alone, there would nevertheless be no conflict between the decision there involving such separate action and the decision of the Circuit Court in this case involving joint action.

B.

The Decision of the Court Below Is Correct.

This case not being in conflict with *Brannan* v. *Stark*, there remains little doubt of its correctness. On all other grounds, the decision below was an unanimous affirmance of the views of the Trial Judge. A dissent by one of the judges of the Circuit Court rested solely on the view that the present case is not distinguishable from *Brannan* v. *Stark*. Otherwise, the dissenting judge agreed "entirely with the excellent analysis and disposition of the problem" in the majority opinion. In addition to arguments in the briefs of other respondents, it is here pointed out that in the present case the Secretary is exercising his power to cooperate with State authority. Whatever necessity for cooperative payments may exist in the absence of Federal-State cooperation, necessity is even clearer in a case where such cooperation exists between the Federal Government and a State which is authorized to and does require cooperative payments.

The statutory terms in the State and Federal statutes are of general scope for application in a wide variety of circumstances. The petitioners refer, in their brief, only to the Federal Act, the relevant terms of which are that

a milk order may provide "a method" of regulation, may provide a uniform price for milk subject to provisions "equitably to apportion" the value of the milk among all producers, and may include provisions that are "incidental", "necessary", and "not inconsistent" with the other statutory provisions. (7 U.S.C. 608c(5)(A), 608c (5)(B), and 608c(7)(D)) These provisions in the Act are variables to be applied to diversified circumstances, and the scope of the statutory terms cannot be determined merely as a matter of law. Here as in *First National Bank* v. *Beach*, 301 U. S. 435, 440-441, the statutory terms "have a color and a content that may vary with the setting" and in each case the totality of the facts is to be considered and appraised. It is familiar doctrine that the "penumbral bounds" of general terms in a regulatory statute are not to be interpreted in "an abstract, sterile way". *Federal Communications Com'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 90-96. See, also, *Secretary of Agriculture* v. *Central Roig Co.*, 338 U. S. 604, 614.

Congress recognized that the terms in the Federal statute are applicable to divergent and mutable situations, and that the effectiveness of the statutory provisions "depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions". Sen. Rep. No. 565, 75th Cong., 1st Sess., p. 3; H. R. Rep. No. 468, 75th Cong., 1st Sess., p. 3. Here, as in *Welch* v. *Helvering*, 290 U. S. 111, 113-114, "the decisive distinctions (in applying statutory terms of general import to factual situations) are those of degree and not of kind." It has been said that an attempt to harmonize various decisions with respect to statutory terms which in application have their rootage in factual situations is "a futile task" because it involves "the appreciation of particular situations, at times with borderline conclusions." *Id.* at 116.

CONCLUSION

For the foregoing reasons, together with the reasons discussed in the briefs for the other respondents, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

KEITH L. SEEGMILLER
1616 Eye Street, N. W.
Washington 6, D. C.

Attorney for Daniel J. Carey Commissioner of Agriculture and Markets of the State of New York.

Of Counsel:

ROBERT G. BLABEY, Associate Counsel
State of New York Department of
Agriculture and Markets
Albany, New York

APPENDIX A

Provisions of the statute of the State of New York relevant to the arguments contained in this brief but not fully set forth at the place of reference in the text are set forth below. The official citation of them is Article 21 of the Agriculture and Markets Law of the State of New York, Sections 258-m 1, 10, 11 and 258-n. (McKinney's Consolidated Laws of New York annotated, 1954)

Sections 258-m 1, 10, 11 provide:

"1. Upon the petition of a producers' bargaining agency of the production area supplying a marketing area, such agency representing at least thirty-five per centum of the producers of milk therein, alleging the existence of conditions so affecting the orderly marketing of milk in such area that public interest requires regulation of prices of milk in such area and equalization of the burden of surplus milk and expense of handling it, and sharing the benefits of the fluid market in order that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective, it shall be the duty of the commissioner to call a public hearing for the consideration of said petition and to give notice thereof by advertising such call with a copy of such petition in such newspaper or newspapers of general circulation in such marketing area as the commissioner deems advisable. Such notice shall specify a time not less than ten days after the date thereof and a place within the marketing area at which the hearing will be held and at which the applicants and other persons, including producers, distributors and consumers and associations thereof, may be heard. If after such hearing the commissioner shall find, upon the testimony given at the hearing that conditions referred to in section two hundred and fifty-eight-k exist so affecting the orderly marketing of milk in such area, that public interest requires that the public policy declared in section two hundred and fifty-eight-k of this chapter shall be effective and that it is necessary that prices

for milk to producers and associations of producers be fixed by the commissioner, as expressed by section two hundred and fifty-eight-k, and that it is favored by at least sixty-six and two-thirds per centum of the producers of milk produced in the production area for said marketing areas, he may by order fix and determine for such marketing area fair and equitable minimum prices to be paid to producers. Such price fixing order or orders shall be rescinded effective at the end of the current month after a public hearing whenever the commissioner shall find either that such conditions have ceased to exist or that such termination is favored by at least thirty-five per centum of the producers of milk handled within such market."

"10. Any marketing agreement or order of the commissioner may provide for necessary deductions from payments to producers to cover the cost of administering such marketing agreement or order, including the cost of auditing milk dealers' classifications, and the cost of other services to producers. The funds so derived from such deductions shall not be deemed state funds. The commissioner may, in his discretion, appoint an administrator and such assistant administrators as in his opinion may be necessary to administer the terms of any agreement or order, and the persons so appointed shall be deemed to occupy positions confidential to the commissioner and may be appointed without competitive examination. All other persons employed by the commissioner in the administration of such a marketing agreement or order shall be selected in accordance with the civil service law and rules."

"11. Any marketing agreement or order of the commissioner may provide (a) for payments to cooperative associations of producers in cases where the commissioner finds that such associations are actually rendering such marketing services to producers under contract with them, or are rendering services in the control and disposition of surplus for the benefits of the market; (b) for payment to milk dealers or to cooperative associations of producers which operate milk receiving stations or manufacturing plants for services rendered by them, in the stabilizing of the

supply of fluid milk and cream within the market at times either of surplus or of shortage of milk; and (c), if the commissioner shall find that it is in the public interest and will tend to effect a more favorable seasonal balance as between production and consumption; for the making of deductions from the fund to equalize the prices of milk to producers, in computing the equalized base price for any of the months January through June of any year, in amounts in accordance with such order or marketing agreement provided the commissioner shall have found such amounts reasonable to provide an incentive for production in accordance with fluid market needs and/or as a means of reducing or eliminating seasonal adjustment of class prices, which amounts so deducted for any of such months in any year shall be held as a special reserve solely for adddition to the equalization fund for any of the months of July through December next following such deductions, and in such manner and for such months as the order or marketing agreement may provide. Such deductions and amounts constituting a special reserve shall not be deemed to be included within the provisions of section two hundred fifty-eight-i of this chapter and shall not be deemed to be state funds. The commissioner shall make no order for such deductions constituting a special reserve under this section except on the petition of a producers' bargaining agency of a production area supplying a marketing area where a state order is in effect exclusively or in effect concurrently with a federal order which authorizes such deductions pursuant to the provisions of the agricultural marketing agreement act of nineteen hundred thirty-seven and after a public hearing and subsequent producer approval is required by section two hundred fifty-eight-m of the agriculture and markets law."

Section 258-n provides:

"The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform

milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders."

APPENDIX B

(Record Reference, Joint Appendix 85-90)

MEMORANDUM OF THE PRINCIPLES OF COOPERATION TO BE OBSERVED IN THE FORMULATION AND ADMINISTRATION OF COMPLEMENTARY ORDERS FOR MILK FOR MARKETING AREAS LOCATED WITHIN THE STATE OF NEW YORK TO BE ISSUED CONCURRENTLY BY THE SECRETARY OF AGRICULTURE AND THE COMMISSIONER OF AGRICULTURE AND MARKETS.

In order that the policies of cooperation embodied in Section 10(i) of Public Act No. 10, 73d Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937, and Section 258-n of Article 21 of the Agricultural and Markets Law, State of New York, may have their fullest possible effect in spirit and in practice, the following principles of procedure are hereby mutually approved as the basis of cooperation in marketing areas in the State of New York in which Federal and State complementary and concurrent orders, rules, or regulations may hereafter be issued.

Joint Procedure

It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders regulating the acquisition of milk by handlers and milk dealers who market or in any manner participate in the acquisition, processing, or distribution of milk to be marketed in such marketing areas as may be defined in such complementary and concurrent Federal and State orders, and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders.

Uniform Provisions

The Secretary of Agriculture and the Commissioner shall, in their respective complementary and concurrent orders for marketing areas within the State of New York, establish (a) identical classifications of milk to which comparable prices, inclusive of authorized assessments, fees, adjustments, or deductions, shall apply, and (b) identical differentials or other terms or conditions of purchase and acquisition and payment to the extent authorized by the respective Federal and State statutes. In the event any method of payment to producers or associations of producers is prescribed by both orders applicable to the same marketing area, provisions for such method shall be so drawn in the respective Federal and State complementary and concurrent orders that the plan of uniformity for all producers or associations of producers

supplying the market will not be altered in any way by the fact that the acquisition of such milk or the payment therefor is deemed to be governed by either order. The contents of any such order issued by the Secretary of Agriculture or by the Commissioner shall be limited to terms, conditions, and prices relative to the acquisition of milk by handlers and milk dealers, and accounting and settlement therefor, and the administration thereof.

Exchange of Information

It shall be the policy of the Secretary of Agriculture and the Commissioner to exchange all information essential to the proper administration of their respective complementary and concurrent orders and relative to transactions within the regulatory jurisdiction of such authorities. The confidential nature of information so exchanged shall be subject to the requirements of Section 10(i) of Public No. 10, 73d Congress, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, and, on the part of the Secretary of Agriculture, to the provisions of the Agriculture and Markets Law, State of New York, and in either case subject to such rules and regulations as may be issued under the respective Federal and State statutes.

Administrative Agency

The Secretary of Agriculture and the Commissioner shall utilize one and the same agency for the administration of each respective complementary and concurrent order, which shall be a market administrator who is approved and designated as such by both the Secretary of Agriculture and the Commissioner. The duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by

him shall not be utilized by either the Secretary of Agriculture or the Commissioner, during the period of employment, in the administration of any other orders or of the terms or conditions in any other orders not common to both. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing herein shall be deemed to prevent the Secretary of Agriculture or the Commissioner from designating the same person as the market administrator of complementary and concurrent orders issued for each of two or more marketing areas within the State of New York.

Finances

Expenses incurred in the maintenance of the market administrator's office shall be paid by assessments or deductions made and collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market administrator, subject to the audit of both Federal and State authorities. Such assessments or deductions shall be identical in rate and shall be made in such a way that uniformity under the Federal and State orders in returns to producers and gross cost to handlers or milk dealers, inclusive of such assessments or deductions as the case may be, shall not be affected by the manner of making the assessment or deduction under the respective orders.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from overhead incurred by the Federal or State governments in the administration, supervision, and enforcement of such orders.

Administration

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. It is also understood that whatever periodical reports are required to be made by the market administrator to the respective central offices of the Federal and State governments, shall be uniform. Likewise the books, records, and accounts of the market administrator shall be open for inspection and audit to both the Secretary of Agriculture and the Commissioner.

Enforcement

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto so that a cooperative effort may be made to decide upon a proper course of action. In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the Secretary of Agriculture and the Commissioner will undertake, both severally and jointly, to utilize all means at their disposal for the effective enforcement of such orders.

Interstate Cooperation

In recognition of a common interest in the regulation of marketing conditions on the part of duly constituted authorities of the State in which the marketing areas are located and those of the States from which substantial quantities of milk flow to such marketing areas, and with a view to encouraging coordination of effort in the regu-

lation thereof, the Secretary of Agriculture and the Commissioner will follow the policy of inviting consultation with such authorities from time to time in matters of mutual interest arising in connection with the formulation, modification, or administration of complementary and concurrent orders applicable to marketing areas within the State of New York.

Signed this 26th day of August 1938.

/s/ Halton V. Moyes

Commissioner of Agriculture and Markets, State of New York

/s/ H. A. Wallace
Secretary of Agriculture

APPENDIX C

When this suit was instituted on March 11, 1952, the provisions for cooperative payments were contained in Section 927.76 of Official Milk Order No. 126 as amended February 19, 1952. During the pendency of this case, Order No. 126 was further amended effective December 16, 1953.

Section 927.76 as amended February 19, 1952, provided: (Record reference, joint appendix 475-476)

> "Sec. 927.76 Cooperative payments. Any cooperative association of producers may apply to the Commissioner for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members; arranging for and supplying, in a manner commensurate with the marketing capacity of the several types of cooperative associations designated in this section, in times of short supply, Class 1 milk to the marketing area; securing

utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers; having its entire activities under the control of its members; and complying with all provisions of this order applicable to it.

"After the Commissioner has determined any cooperative to be qualified to receive payments pursuant to this section, such cooperative shall, from time to time, as requested by the market administrator, make reports to the market administrator with respect to services rendered to the market and the use of the sums received under this section. Whenever the market administrator has reason to believe that any cooperative qualified by the Commissioner is failing to perform the obligations covered by the payments under this section, he shall suspend and hold in reserve such payments, notifying the Commissioner and the cooperative of his action and the reasons therefor. Such suspended payments shall be held in reserve until the Commissioner has, after hearing, ruled upon the performance of the cooperative in whole or in part or disqualified the cooperative, in which event the balance of payments held in reserve shall be returned to the producer settlement fund.

"The market administrator shall make the payments authorized by this section, or issue credit therefor, out of the producer settlement fund on or before the 25th day of each month, subject to verification of the report upon which such payment is based. Such payments shall be made to each cooperative association of producers under the following conditions and at the following rates:

"(a) Three-quarters of one cent per hundredweight of milk received from producers at any handler's plant which was caused to be delivered from its members by such associations and on which such handler has made the reports and payments required by this order;

"(b) Except as set forth in paragraph (c) of this section, two cents per hundredweight of milk received from producers at plants of other complying handlers which was reported and collected for by such associations; and

"(c) Four cents per hundredweight of milk received from producers at plants operated by such association and, if, in addition to the other qualifications, such association has been determined by the Commissioner to have sufficient plant capacity to receive all the milk of producers who are members, four cents per hundredweight of milk received from producers which was caused by it to be delivered to any other complying handler and which is reported and collected for by such association."

The entire State Order No. 126 as amended December 16, 1953, is set forth below: (Record reference, joint appendix 65-73)

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF MILK CONTROL

ORDER AMENDING REVISED OFFICIAL ORDER NO. 126
EFFECTIVE DECEMBER 16, 1953

WHEREAS pursuant to the provisions of Article 21 of the Agriculture and Markets Law as amended, the Commissioner of Agriculture and Markets duly promulgated his Official Order No. 126 effective as of September 1, 1938, regulating the handling of milk produced for sale in the New York Metropolitan Milk Marketing Area as defined in such official order, which order as revised and amended is in full force and effect; and

WHEREAS the aforesaid Official Order No. 126 was promulgated jointly and concurrently with the promulgation by the Secretary of Agriculture of the United States of the latter's Order No. 27, regulating the handling of milk for the aforesaid marketing area and

WHEREAS the undersigned Commissioner, pursuant to the provisions of the Agriculture and Markets Law as amended, held with the Secretary of Agriculture of the

United States, a joint and concurrent public hearing at Syracuse, New York on January 22 and 23 and on February 16 to 21, 1953 at which all interested parties were afforded an opportunity to be heard on proposed amendments to the aforesaid revised Official Order No. 126 and to the joint and concurrent order (Order No. 27) issued by the Secretary of Agriculture of the United States; and

WHEREAS the Secretary of Agriculture of the United States has found and determined that upon the basis of the record of such hearing his Order No. 27 should be further amended and has on the 9th day of November 1953 issued an order making such amendment effective on and after December 16, 1953; and

WHEREAS it is hereby found upon the testimony given at the hearing hereinbefore mentioned that conditions referred to in Section 258-k of the Agriculture and Markets Law exist, so affecting the orderly marketing of milk in the New York Metropolitan Milk Marketing Area that the public interest requires that the public policy declared in Section 258-k of the Agriculture and Markets Law shall be made effective by further amending the said Official Order No. 126 as hereinafter set forth and that such amendment is approved or favored by at least two-thirds of the producers engaged in the production of milk for the aforesaid marketing area.

NOW, THEREFORE, in cooperation with the United States and its Secretary of Agriculture, and pursuant to the power and authority conferred upon me by Section 258-n and other applicable provisions of the Agriculture and Markets Law, and for the purpose of keeping uniform the said joint and concurrent orders;

IT IS HEREBY ORDERED that Official Order No. 126 be and it is hereby amended and pursuant to Section 19 of the Agriculture and Markets Law, such amendment shall be effective on and after December 16, 1953 as follows:

Delete Section 927.76 of the order as now in effect and substitute therefor the following:

"Sec. 927.76 *Cooperative payments for market-wide services.* Payments shall be made to qualified cooperatives or to federations under the conditions, in the manner, and at the rates set forth in this section.

(a) *Definitions.* As used in this section the following terms shall have the following meanings:

(1) 'Cooperative' means a cooperative association of producers which is duly incorporated under the cooperative corporation laws of a state; is qualified under the Capper-Volstead Act (7 U.S.C. 291 *et seq.*); has all its activities under the control of its members and has full authority in the sale of its members' milk.

(2) 'Federation' means a federation of cooperatives.

(3) 'Federated cooperative' means a cooperative which is a member of a federation and on whose membership the federation is an applicant for or receives payments under subparagraph (2) of paragraph (f) of this section.

(4) 'Member' means, when used with respect to a member of a cooperative or of a federated cooperative, only a member who is also a producer, as defined in Sec. 927.6.

(b) *Qualified cooperatives and federations.* A cooperative or federation may submit an application to the market administrator for payments under the provisions of this section. In accordance with the requirements of the rules and regulations issued by the market administrator, any such application shall include a written description of the applicant's program for the performance of market-wide services, including evidence that adequate facilities and personnel will be maintained by it so as to enable it to perform the market-wide services; and the applica-

tion shall contain a statement by the applicant that it will perform the required market-wide services for which it is applying for payments. The application shall set forth all necessary data so as to enable the market administrator to determine whether it meets the qualification requirements with respect to the payments for which the application is submitted. An application shall be approved by the market administrator only if he determines that:

(1) In the case of a cooperative:

(i) It has not less than 4,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them: *Provided,* That no person shall be counted in this respect as a member if he is a member of another cooperative which is an applicant for or which receives cooperative payments, or if he is a member of a federated cooperative.

(ii) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, it has not less than 6,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them, subject to the proviso in subdivision (i) of this subparagraph.

(iii) If the application is also for an additional payment under subparagraph (4) of paragraph (f) of this section, the cooperative is an operating cooperative which operates marketing facilities, i.e., pool plant(s), at which it receives at least 25 per centum, by weight, of the milk marketed by all of its members: *Provided,* That in determining whether the 25 per centum minimum requirement is complied with there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or

which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(2) In the case of a federation:

(i) It is duly incorporated under the laws of a state.

(ii) It has contracts with each of its federated cooperatives under which the cooperatives agree to remain in the federation for at least one year, and such contracts cover or will be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes.

(iii) Its federated cooperatives have an aggregate of not less than 4,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by them; and its federated cooperatives will pay to the federation, when required by rules and regulations issued by the market administrator, the minimum monthly payment specified in the rules and regulations to finance the activities of the federation that are not market-wide in character: *Provided,* That no person shall be counted in this respect as a member if he is a member of a cooperative which is an applicant for or which receives cooperative payments, or if he is a member of another federated cooperative.

(iv) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, the aggregate membership of the federated cooperatives is not less than 6,000 members and the federated cooperatives receive from their members not less than 1¢ per hundredweight of milk delivered by their members, subject to the proviso in subdivision (iii) of this subparagraph.

(v) If the application is also for an additional payment under subparagraph (5) of paragraph (f) of this section, the federation operates marketing facilities, *i.e.*, pool plant(s), or the federated cooperatives operate marketing facilities, at which is received at least 25 percentum, by weight, of the milk marketed by the members of the federated cooperatives: *Provided,* That in determining whether the 25 percentum minimum requirement is complied with, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or whiih is not meeting the requirements of this section applicable to it.

(3) The applicant cooperative or federation demonstrates that it has the ability to perform the market-wide services for which application is made, and that such services will be performed.

(4) The applicant cooperative or the federated operatives of an applicant federation are in no way precluded from arranging for the utilization of milk under their respective control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(c) *Notice of qualification or denial: Effective date.* Upon determination by the market administrator that a cooperative or a federation is qualified to receive payment for performance of the market-wide services, he shall transmit such determination to the applicant cooperative or federation and publicly announce the issuance of the determination. The determination shall be effective with respect to milk delivered on and after the first day of the month following issuance of the determination. If, after consideration of an application for payments for market-

wide services, the market administrator determines that the cooperative or federation is not qualified to receive such payments, he shall promptly notify the applicant and specifically set forth in such notice his reasons for denial of the application.

(d) *Requirements for continued qualification.* From time to time and in accordance with rules and regulations which may be issued by the market administrator, each qualified cooperative or federation must demonstrate to the market administrator that it continues to meet the qualification requirements for the payments and is fully performing the market-wide services for which it is being paid.

(e) *Market-wide services.* Each cooperative or federation shall perform the market-wide services enumerated in this paragraph. Such services are: (1) Analyzing milk marketing problems and their solution, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Commissioner or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participating in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter; (5) conducting a comprehensive educational program among

producers—*i.e.*, members and non-members of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing publications that contain relevant data and information about the order and its operation, and the distribution of such publication to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend; and (6) in the case of a cooperative or federation which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of this section, operating marketing facilities, or having within its membership federated cooperatives operating marketing facilities, *i.e.*, pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives.

(f) *Rate, computation, time, and method of payment.*

(1) Subject to the provisions of paragraph (g) of this section, the market administrator, on or before the 25th day of each month, shall make payment out of the producer-settlement fund, or issue equivalent credit therefor, to each cooperative or federation which is qualified for such payments for market-wide services. The payment to a cooperative shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from its members, and the payment to a federation shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from the members of its federated cooperatives, subject in both instances to adjustment upon verification by the market administrator.

(2) Such payment or credit shall be at the rate of 2 cents per hundredweight of milk in accordance with sub-

paragraph (1) of this paragraph: *Provided,* That in computing payment to a cooperative there shall be excluded all of the milk of its members who belong to another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk; and *Provided further,* That in computing payment to a federation there shall be excluded all of the milk of members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) Any cooperative that has at least 6,000 members and any federation which has an aggregate membership of its federated cooperatives of at least 6,000 members shall receive a payment, in addition to the payment provided for in subparagraph (2) of this paragraph, of 1¢ per hundredweight of milk in accordance with subparagraph (1) of this paragraph and subject to the provisos contained in subparagraph (2) of this paragraph.

(4) Any cooperative that operates marketing facilities, *i.e.*, pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all of its members shall receive a payment, in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by its members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which received cooperative payments on the same milk or which is a federated co-

operative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(5) Any federation that operates marketing facilities, *i.e.*, pool plant(s) or whose members include one or more federated cooperatives that operate marketing facilities, at which is received at least 25 per centum, by weight, of the milk marketed by all the members of its federated cooperatives shall receive a payment, in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by such members in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing the payment under this subparagraph there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an appliant for or receives cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(6) If an individually qualified cooperative is affiliated with a federation, the cooperative payment shall be made to such cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments.

(g) *Disqualification.*

(1) The market administrator shall issue an order wholly or partly disqualifying a previously qualified cooperative or federation for payments authorized pursuant to this section and such payments shall not thereafter be made to it if he determines that:

(i) The cooperative or federation no longer complies with the requirements of this section: *Provided,* That in the case of the federation, if one of its federated cooperatives has failed to comply with the requirements of this section applicable to it or has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification, the federation shall be disqualified only to the extent that its qualification for payments or the amount of its payments are based upon the membership, milk or operations of such non-complying federated cooperatives;

(ii) The cooperative or federation has failed to make reports or furnish records pursuant to this section or pursuant to rules and regulations issued by the market administrator; or

(iii) In the case of the cooperative, it has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(2) An order of the market administrator wholly or partly disqualifying a cooperative or federation shall not be issued until after the cooperative or federation has had opportunity for hearing thereon following not less than 15 days' notice to it specifying the reasons for the proposed disqualification. If the cooperative or federation fails to file a written request for hearing with the market administrator within such period of 15 days, the market administrator may issue an order of disqualification without further notice; but if within such period a request for hearing is filed, the market administrator

shall promptly proceed to hold such hearing pursuant to rules and regulations issued by him under paragraph (i) of this section.

(3) A disqualification order issued by the market administrator shall set forth the findings and conclusions on the basis of which it is issued.

(h) *Appeals.*

(1) *From denials of application.* Any cooperative or federation whose application for qualification has been denied by the market administrator may, within 30 days after notice of such denial, file with the Commissioner a written petition for review. But the failure to file such petition shall not bar the cooperative or federation from again applying to the market administrator for qualification.

(2) *From disqualification orders.* A disqualification order by the market administrator shall become final 30 days after its service on the cooperative or federation unless within such 30-day period the cooperative or federation files a written petition with the Commissioner for review thereof. If such petition for review is filed, payments for which the cooperative or federation has been disqualified by the order shall be held in reserve by the market administrator pending ruling of the Commissioner, after which the sums so held in reserve shall either be returned to the producer-settlement fund or paid over to the cooperative or federation depending on the Commissioner's ruling on the petition. If such petition for review is not filed, any payments which otherwise would be made within the 30-day period following issuance of the disqualification order shall be held in reserve until such order becomes final and shall then be returned to the producer-settlement fund.

(3) *Record on appeal.* If an appeal is taken under subparagraph (1) or (2) of this paragraph, the market

administrator shall promptly certify to the Commissioner the ruling or order appealed from and the evidence upon which it was issued: *Provided,* That if a hearing was held the complete record thereof, including the applications, petitions, and all exhibits or other documentary material submitted in evidence shall be the record so certified. Such certified material shall constitute the sole record upon which the appeal shall be decided by the Commissioner.

(i) *Regulations.* The market administrator is authorized to issue regulations and amendments thereto to effectuate the provisions of this section and to facilitate and implement the administration of its provisions. Such regulations shall be issued in accordance with the following procedure:

(1) All proposed rules and regulations and amendments thereto shall be the subject of a meeting called by the market administrator, at which all interested persons shall have opportunity to be heard. Not less than five days prior to the meeting, notice thereof and of the proposed regulations or amendments shall be mailed to qualified cooperatives and federations. A stenographic record shall be made at such meetings which shall be public information and be available for inspection at the office of the market administrator.

(2) A period of at least five days after the meeting shall be allowed for the filing of briefs.

(3) All regulations and amendments thereto issued by the market administrator pursuant to this section must be submitted in tentative form to the Commissioner for approval, shall not be effective without such approval. The regulations or amendments in tentative form shall be forwarded also to cooperatives and federations qualified under this section and to other persons upon request in writing. The Commissioner shall either approve the reg-

ulations or amendments thereto submitted by the market administrator or direct the market administrator to reconsider the tentative rules or amendments. In the event the market administrator is directed to give reconsideration to the matter, the market administrator shall either issue revised tentative regulations or amendments or call another meeting pursuant to this section for additional consideration of the rules or amendments.

(j) *Reports and records.* A qualified cooperative or federation and any federated cooperative in a qualified federation shall make such reports to the market administrator as may be requested by him for the administration of the provisions of this section, and shall maintain and make available to the market administrator or his representative such records as will enable the market administrator to verify such reports.

(k) *Notices, demands, orders, etc.* All notices, demands, orders or other papers required by this section to be given to or served upon a cooperative or federation shall be deemed to have been given or served as of the time when mailed to the last known secretary of the cooperative or federation at his last known address.

(l) *Adjustment period.* Any cooperative which was qualified, on the effective date of this section, to receive payments pursuant to the provisions of Sec. 927.76 as effective December 31, 1952 (referred to in this paragraph as the 'former provisions'), shall continue to receive payments pursuant to and subject to the conditions specified in such former provisions on milk received from producers during the 90-day period immediately following the effective date of this section; and if such cooperative has applied, or is a federated cooperative of a federation which has applied, for qualification pursuant to this section prior to the expiration of such 90-day period, it shall continue to receive payments pursuant to the former pro-

visions beyond such 90-day period until such time as the market administrator has ruled upon such application: *Provided,* That a cooperative or a federation may be qualified to receive payments pursuant to this section within such 90-day period; and *Provided Further,* That in no event shall a cooperative, or a federated cooperative in a federation, receive payment under the former provisions for any period following the effective date of qualification of the cooperative or federation under this section. For the purposes and to the extent specified in this paragraph, the provisions of Sec. 927.76 as effective December 31, 1952, shall remain in force and effect after the effective date of this Section."

C. CHESTER DU MOND, Commissioner
of Agriculture and Markets of the
State of New York

By /s/ Kenneth F. Fee
Kenneth F. Fee, Director
Division of Milk Control

Dated at Albany, N. Y.
November 24, 1953.

No. 697

MAR 23 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

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OSCAR L. GRANT, et al.,

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v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States, and

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ADAMS PRODUCERS COOPERATIVE, INC., et al., Intervenors, and

METROPOLITAN COOPERATIVE MILK PRODUCERS' BARGAINING AGENCY, INC., and MUTUAL FEDERATION OF INDEPENDENT COOPERATIVES, INC., Intervenors,

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

The respondent Secretary's statement of the Question Presented emphasizes the Secretary's conclusion that (1) the activities referred to in the challenged provisions constitute market-wide services and (2) are worth more to each producer than the amount which is paid to the cooperatives, which incur expenses in the performance of such activities at least equal to the amount thus received from the Producer Settlement Fund. This crystallizes the

extent to which the decision below clashes with *Stark*. In *Stark*, it was held that the same activities were of but indirect or incidental benefit or service to non-members, and that therefore their market-wide nature was immaterial. Hence, any value therefrom accruing to non-members or any expense incurred therein by members was likewise deemed immaterial. Therefore, this Court held, *inter alia*, that the "uniform price" requirement of the Act was violated "because non-members are paid only the blended price while members receive, through their associations, the disputed payments in addition to the blended price" (342 U. S. 451, at 464).

That the challenged orders purport to require performance of these activities, as a condition to receiving the payments, is likewise immaterial. Here, it is significant that the Briefs in Opposition do not dispute that the activities involved have been and are the normal and customary activities of efficient cooperatives in general, engaged in servicing their own members and promoting their own interests, at member expense, in all major milk markets, whether or not under regulation.[1] The activities or services "required" by the orders are merely the routine business of efficient cooperatives fulfilling their membership contracts. Hence, the above quoted conclusion in *Stark* is equally applicable here.

The 1953 Amendment, which does spell out these requirements in Sec. 927.76(e), studiously avoids reference to non-members in five of the six.[2] There is not one word in this provision (or in the findings) which requires a co-

[1] See Petition, p. 11, text and note 8; also Petition, pp. 19-20. The Department's Official Committee of Experts even testified that cooperatives elsewhere, solely member-financed, perform such services *better* than in New York: With but one exception, "New York cooperatives are not performing services in the area of Order Activities and Education comparable in scope or effectiveness to the services performed by the leading cooperatives in other markets." Vol. V, Jt. App. 2186.

[2] Only Item (5) of Sec. 927.76(e) refers to non-members, and this is answered in Petition, p. 8.

operative (or federation) to propose an amendment desired by any non-member farmers or group[3] thereof, to lend its lawyer to protect a non-member witness during cross-examination at a hearing, or to lend its economist or lawyer to help the non-member draft a proposal or to prepare his supporting evidence or brief. Hence, five of the six requirements in the 1953 Amendment neither recite on their face nor permit the construction that they require any service or benefit to non-members, other than that which might incidentally or indirectly result from activities primarily in the interest of cooperative members. Of course, neither the 1938[4] nor 1953 provision requires the maintenance of surplus disposal plants, for members or non-members.

Inasmuch as the cooperative activities involved herein are merely the customary functions of efficient cooperatives, engaged in for members at member expense throughout the United States, the fact of such expense or cost is immaterial to this case. Indeed, in *Stark* this Court took cognizance that "Cooperative plants showed higher costs than those of proprietary handlers", 342 U. S. at 455, due in part to the handling of surplus, and nevertheless held the Boston order invalid.[5]

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[3] The term non-member includes farmers who are members of, and therefore bear expenses of, the many farm organizations throughout the New York Milkshed which are not incorporated, or which do not technically meet the Capper-Volstead Act requirements [7 U. S. C. Sec. 291] referred to in Sec. 927.76(a)(1) of Order No. 27; Appendix, p. 14.

[4] See Petition, p. 12, note 10 as to the 1938 provision; and p. 14, note 12 as to the 1953 amendment. See also *infra*, p. 7, note 10.

[5] Even if the *expense* to members for such activities is as material as the Secretary contends, he made a clearly reversible error in failing to find (upon the uncontradicted evidence of his own Department's experts) the *income* received only by members from some of these very activities. His official Committee of Experts reported (Vol. V, Jt. App. 2162) that during the 13 years of 1940-1952 "it was possible for most cooperatively owned plants to negotiate handling charges more than sufficient to cover their costs." This, of

In his statement of the Question Presented, the Secretary also directs attention to the existence of New York State Order No. 126, containing terms similar to the Federal Order No. 27 here challenged. The Cooperatives' Brief in Opposition dwells first and foremost (pp. 10-11; also p. 9) upon this issue, deemed immaterial below: that Order No. 27 (unlike Order No. 4 in Boston) was issued concurrently with and complementary to the similar New York State Order No. 126. See also New York Commissioner's Brief in Opposition, pp. 3-11. This difference between the instant case and *Stark* was pressed upon the District Court below; nevertheless, that court held it immaterial to this case (Vol. I, Jt. App. 177):

> "This court is of the opinion that the New York State Act has no effect or consequences upon the Federal Order, and that the Federal Order must stand or fall under 7 U. S. C. A. Sec. 601 et seq."

In the Court of Appeals all respondents again urged at length that the concurrent order issued by the New York State Commissioner under State law distinguished this case from *Stark;* Brief of Secretary, pp. 50-51; Brief of New York Commissioner, pp. 5-13; Brief of Cooperatives, pp. 23-29. The Court of Appeals, nevertheless, distinguished this case on much different grounds, leaving the opinion of the District Court undisturbed on this point.

The milk which is calculated in the Producers Settlement Fund under Order No. 27 originates in the six states of New York, Pennsylvania, New Jersey, Connecticut, Massachusetts and Vermont (Vol. VII, Jt. App. 3165). The dairies and milk plants supplying the said area are

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course, meant revenues to members in which non-members did not share. They also testified (Vol. V, Jt. App. 2176): "It is true as stated previously, that the higher rate of payment to operating cooperatives has encouraged cooperative ownership and operation of plants, but it is apparent that in *most* instances the benefits have gone principally to the *members* of these cooperatives." (Emphasis ours.) Therefore, official statistics showed that many qualified cooperatives paid their members *above* the uniform price; Vol. III, Jt. App. 1151.

"scattered" throughout these states; *U. S.* v. *Rock Royal Cooperative Inc.*, 307 U. S. 533, 550. Nearly half of the milk shipped into New York City crosses state lines; *Titusville Dairy Products Co.* v. *Brannan*, 176 F. (2d) 332 (C. A. 3), 337, cert. den. 338 U. S. 905; and much of the milk calculated in the Producers Settlement Fund never even enters the State of New York; *id.*; and see *Dairymen's League Cooperative Association* v. *Brannan*, 173 F. (2d) 57 (C. A. 2). The New York Commissioner respondent conceded below: "There is but one pool into which intra and interstate traffic has been inextricably intermingled"; New York Commissioner's Brief, Court of Appeals, page 13. See also Brief for Respondent Cooperatives in Opposition (p. 10). It necessarily follows that the Fund directly involves interstate commerce. This being so, this Court has already ruled that New York State Order No. 126 has no bearing. In *U. S.* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 540, this Court held as follows:

> "* * * The two orders are in *pari materia*, one covering milk moving in or directly burdening, obstructing or affecting interstate commerce and the other covering milk in intrastate commerce * * *." [Petition of State dismissed, at 581.]

Therefore, the courts below were correct in regarding the New York State law and the Commissioner's order thereunder of no effect or consequence in this case.[6] Of course, if this case did involve the question of whether the law of a State (New York) can make valid the action of this federal

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[6] In the Act of 1937, Sec. 10(i), Congress authorized the Secretary to issue orders "complementary" to state orders, not joint orders. Federal and state milk programs may be similar and concurrent; but their orders are not joint and the Secretary does not so contend, although the two jurisdictions are referred to as having a joint "program." The Congress itself explained Sec. 10(i) of the Act as giving no new authority to the states: "Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other"; *Senate Report No. 1011*, 74th Cong., 1st Sess. p. 15. It also is clear that Sec. 10(i) gave no authority to the Secretary beyond Sec. 8c, as was held below; Vol. I, Jt. App. 177.

agency held invalid elsewhere (*Stark*), it would present an additional serious issue of public importance warranting the granting of this petition.

The Secretary's findings (Vol. I, Jt. App. 110-111), as noted in the courts below and in his Brief in Opposition, emphasize the "unique" nature of the New York milkshed primarily due to its size, with 50,000 milk producers covering 6 states, and the attendant diversity of interests and conditions; Secretary's Brief, pp. 11, 22; see also Cooperatives' Brief in Opposition, pp. 7-9.

As shown above,[7] there is nothing "unique" about the activities of cooperatives in the New York milkshed or in the market-wide effects thereof, these being common to all major milk markets; and the Secretary made no finding that this market was unique in these respects. His finding that this market is "unique" (Vol. I, Jt. App. 111) is based entirely on "size" and the factors attendant to size (*id.*, pp. 110-111). When the principal respondents herein attempt to distinguish Order No. 27 from the Secretary's 63 other orders upon the basis of findings of particularly "unique" conditions, such attempt rests on differences of size and size alone.[8] However, the decisions of the courts below do not distinguish this case from *Stark* on the basis of the unique size of the New York market. The courts below attempt to distinguish the two cases upon much different grounds.

Respondents' opposition to this petition, therefore, places great emphasis on two differences (one, State Order No. 126; the other, size) between this case and *Stark*, which the courts below either discarded or deemed immaterial.

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[7] See p. 2 above, text at note 1.

[8] We submit that the issue of statutory power herein involved does not and cannot turn upon market size; prior to 1953 the Secretary himself did not think so, having promulgated similar orders in three markets much smaller than New York, including the Dayton-Springfield, Ohio, area (population only 350,000). 7 C. F. R. Sec. 971.80 (1951).

The Secretary's Brief in Oppositi ion states (p. 17) that the petition raises no question in res spect to the rulings be low that the Secretary's findings [o of fact] are supported by substantial evidence. This is tr rue. But whether the findings give legal validity to the c hallenged order provi sions under the Act of 1937 is a mu uch different question, properly raised on petition for certi iorari.

Respondent Cooperatives twice st tate (pp. 2, 5) that in the Court of Appeals petitioners ab bandoned an attack on the Secretary's findings; but such a ssertions mistake peti tioners' position. Except on one or r two obvious errors of fact [9] not directly pertinent to this pe etition, petitioners have not made an issue as to evidentiary s support of his findings.

Insofar as concerns the critical is issue upon this petition for a writ (conflict with *Stark*), majo or points raised by peti tioners are (a) the failure of the cou urts below to apply the text of *Stark* to the specific languag e of the two challenged provisions; (b) the failure of the cou urts below to give effect to the specific language [10] of these t two provisions; and (c)

[9] For example, the Secretary stressed (Vol. I, Jt. App. 112) that the number of qualified cooperatives decreased from 84 in January 1940 to 73 in June 1952. This finding was an error, since the undisputed official statistics of the Department in the same hearing record clearly showed an increase: only 64 qualified cooperatives there were on original records certified in January 1940, Ex. 16 of Vol. XIX o (Vol. VII, Jt. App. 3147). Thus, to this Court; and 66 in June 1940 (Vol. I creased. the number increased to 73, instead of dec

[10] For example, the court below erro neously assumed that the phrase "marketing facilities, i.e., pool plants" in Sec. 927.76(e), Clause (6) of the 1953 Amendment, App pendix, p. 20, had "reference of surplus milk" (Appendix, to maintaining facilities for the disposal of language clearly covers pool p. 37). See Petition, p. 13. The order plus disposal facilities. The Secretary's findings as to the phrase "m plants of any kind, whether or not surp arketing facilities" (Vol. I, Jt. App. 117, last par.) are silent as to hen facilities for the disposal of surplus milk. On the other hand, whe the Secretary's findings elsewhere did refer to "facilities for the disposal of surplus milk," he described such facilities as "manufac turing plants" or "manufac within the same finding (Vol. turing facilities" no less than 5 times wit below not only misinterpreted I, Jt. App. 115, first par.). The court be

if any findings of fact and evidence are material in construing this Act, the failure of the lower courts to consider as material certain findings of fact of the Secretary, and certain undisputed evidence of his own Department's experts; the latter evidence was erroneously deemed immaterial by the Secretary.

Petitioners do not ask this Court to correct errors of fact finding below by appraising the significance of conflicting testimony, as was done in *Graver Tank & Mfg. Co. Inc.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. It is our position, first and mainly, that the Secretary, as a matter of law, lacks authority under the clear language of the Act of 1937 to issue the challenged provisions and that, therefore, his findings of fact and conclusions are immaterial. But it is our further contention that, if the evidence and findings thereon in this case may be considered in construing this Act, (a) the Secretary relied upon immaterial findings, and (b) failed to consider or make certain other findings, upon the Department's own undisputed expert evidence, which would here compel the very construction placed upon the Act by this Court in *Stark*. This Court will set aside such agency determinations, even though concurred in by lower courts. *Secretary of Agriculture, et al.* v. *United States, et al.*, 350 U. S. 162; see also *Federal Power Commission* v. *Sierra Pacific Power Company*, Nos. 51, 52, October Term 1955, decided February 27, 1956. In any event, this Court does not extend the conventional rule of acceptance of findings of fact concurred in by two courts, to acceptance of the legal significance of such facts; *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 403-404; *Lustig* v. *United States*, 338 U. S. 74, 77; *Mitchell* v. *King Packing Co.*, 350 U. S. 260.

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the language of the provision, but reached a result inconsistent with the Secretary's findings thereon. Similarly, the 1938 provision was silent as to any requirement of surplus disposal facilities; Petition, p. 12, note 10.

II

The Secretary's Brief in Opposition, p. 22, does not deny that this case presents an important question of federal law. Such denial cannot be inferred from assertions that the New York market is "unique", inasmuch as the unique characteristics of this market are not the activities for which the challenged payments are made, see above, p. 6. Unlike the Secretary, the Cooperatives' Brief denies our contentions (Petition, pp. 16-18) that the decision below is precedent for the future administration of this Act in all markets regulated or to be regulated thereunder. However, the administration of this Act lies with the Secretary, not with the cooperatives. Furthermore, two of the cooperative respondents are members of the National Milk Producers Cooperative Federation which, with the consent of all respondents, filed a motion below to appear as *amicus*, reciting:

> "That many cooperative associations which are members or submembers of the Federation are performing marketwide services of various kinds in markets regulated by Federal milk marketing orders, and others plan to perform such services in the future if the validity of payments to cooperatives for such services is sustained in this case, * * *.
>
> That the decision in this case will set a precedent which will affect the Federation and those cooperative associations represented by it which are engaged in the marketing of milk under Federal milk marketing orders, as well as those which plan to be so engaged in the future."

Although petitioners, as appellants below, opposed this motion, it was on other grounds. This motion is part of the record certified to this Court.

On February 16, 1956, the day after the Petition herein was filed in this Court, the major cooperative of the Washington, D. C. market filed[11] with the Secretary of

[11] Petition of Maryland and Virginia Milk Producers Assn., Inc., filed in Office of Hearing Clerk.

Agriculture a formal request for a hearing upon, and issuance of, a proposed milk marketing order for that market, designated Proposed Order No. 45. Sec. 945.55(g) of said Proposed Order No. 45 contains a provision for cooperative payments *identical* with the provision of Order No. 27 in effect prior to 1953. The above facts sustain petitioners' position as to the national importance of the decision below.

Respectfully submitted,

HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
Harrisburg, Pa.
of Counsel for Petitioners.

APR 1 3 195
HAROLD B. WILLEY,

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HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.,
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
Harrisburg, Pa.,
of Counsel for Petitioners.

Motion for Leave to File Petition for Rehearing

Petitioners respectfully move for leave to file the annexed Petition for Rehearing of the Order of this Court denying the Petition for Writ of Certiorari in this case, entered on April 9, 1956. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, substantial grounds available to petitioners were not previously presented, one of which is based upon *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47.

Dated: April 18, 1956.

HARRY POLIKOFF
Counsel for Petitioners

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its Order of April 9, 1956 denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit as prayed for in the Petition filed herein February 15, 1956.

Reasons for Granting Rehearing

I

Counsel for petitioners, while previously [1] noting that the decision below is precedent for the adoption of similar provisions in other milk marketing orders throughout the United States, did not call the attention of this Court to the fact that any such other provisions can only be attacked in the District of Columbia Circuit. The improbability of litigation elsewhere with a resulting conflict of decision, has been ground for granting a Petition for Rehearing; *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

In the instant case, any challenge of a similar provision in any other order must be brought in the District of Columbia, where service is obtained upon the Secretary. Such challenge must be by injunction procedure, since only producers have standing to raise the issue, and no statutory review is provided for them (*Stark* v. *Wickard*, 321 U. S. 288). Although handlers are afforded a statutory review in their own districts [7 U. S. C. Sec. 615(b)] they have no legal standing to test the issue in this case (*United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 561, followed in *Stark* v. *Wickard, supra*, at 308). Therefore, any action to challenge "cooperative payments" in any order must be brought by producers, by process served upon the Secretary of Agriculture in the District of Columbia; *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941; followed in *C. J. Wicland & Son Dairy Products Co.* v. *Wickard*, 4 F. R. D. 250, 254. The Secretary of Agriculture has successfully resisted the efforts of producers to restrain enforcement of milk marketing orders elsewhere than in the District of Columbia; because the local Market Administrator "has no power to enforce the provisions of such order(s)," *Gudgel* v. *Iverson*, 87 F. Supp. 834.

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[1] Petition, p. 16; Reply to Briefs in Opposition, p. 9.

This is the first case in which any court has sustained a "cooperative payment" provision under the Act of 1937. Therefore, if it does not conflict with *Stark*, it is of sufficient national importance to warrant review by this Court at this time, inasmuch as the question will never arise in any other circuit. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

II

The minority farm groups of the world's greatest milkshed (and the record shows without dispute that some of the petitioners hold membership therein) are doomed to extinction by the decision of the court below, which will henceforth be the law of the land. Dairy farmers cannot long be expected to continue as dues-paying members of the farm organizations of their choice, if compelled instead to pay dues [2] (i.e., the challenged deductions from their milk price) to the favored cooperatives.[3]

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[2] The record is replete with evidence by the proponents of the challenged payments, that the deductions therefor from nonmembers are analogous to the dues paid to cooperatives by members; the amount of the challenged payments was based in part on evidence of the amount paid as dues by cooperative members: Vol. II, Jt. App. 575-576, for example.

[3] Incidentally, there is no finding that "qualified" cooperative associations require the challenged payments in order to sustain their membership. Although the Secretary found that producers of the New York Milkshed "tended to withdraw support from the cooperative associations" (Vol. I, Jt. App. 112), this can only be material if related to the challenged provisions, i.e., if the Secretary also made a finding that such cooperative associations were "qualified" cooperatives, i.e., those engaged in "qualifying" activities or services. But no such finding appears: The small membership decline from 73.9% to 70.4%, upon which the foregoing quotation is based (Vol. I, Jt. App. 112), is for "Total Cooperatives" in the tabulation (Vol. I, Jt. App. 113); this shows 91 on June 1, 1952, but the findings also show that there were only 73 "qualified" cooperatives in June 1952 (*id.*, p. 112). There is no finding and no evidence that the small decline in membership is in the *qualified* cooperatives; and, of course, there is no finding that there was not a similar small decline in membership in cooperatives of other milk markets.

When Congress intended to authorize a requirement of such payments by non-members (employees) to organizations (certain labor unions) which they do not wish to join, it knew exactly the language to use: see Labor Management Relations Act of 1947, 29 U. S. C., Appendix, Sec. 158(a) (3); and see Railway Labor Act, 45 U. S. C. Sec. 152, Par. Eleventh (a). The vast difference between such expression of Congressional policy, and the "auxiliary" clause of Sec. 8c(7)(D) of the Act of 1937, is obvious. However, another point should be noted: The Congress had explicitly designated such labor unions as the exclusive representative of all employees; 29 U. S. C. Appendix Sec. 159(a); 45 U. S. C. Sec. 152, Par. Ninth. But in the Act of 1937, 7 U. S. C. Sec. 608c(12), Congress limited milk cooperative associations to representation only of "members of, stockholders in, or [producers] under contract with" such associations, while taking full cognizance (in the same subsection) that such associations may engage in "advancing the interests of the producers of such commodity." Notwithstanding this express Congressional limitation, the Secretary has patently based the challenged provisions upon his desire to rewrite the Act of 1937, to make certain cooperatives the exclusive [4] representatives of all milk producers and thereby overrule simultaneous [5] Congressional refusal to apply its labor policy to its farm policy: "Active participation by producers in the regulation of milk marketing is feasible only by means of cooperative associations of producers" (Findings, Vol. I, Jt. App. 112).

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[4] Since adoption of the 1953 Amendment, the Secretary even limits his conferences with New York farm groups to the 4 "qualified" associations *only;* see Secretary's Press Release dated April 9, 1956, USDA No. 989-56. This, notwithstanding that different views may be, and often are, held by other groups, including those of which some petitioners are members.

[5] The "auxiliary" powers clause of Sec. 8c(7)(D) AND Sec. 8c(12) WERE originally enacted August 24, 1935, Public No. 320, 49 Stat. 750. The very same Congress approved the National Labor Relations Act, 29 U. S. C. Sec. 159(a), effective July 5, 1935.

And the Secretary effectuated his desire to silence others by compelling the financial support of members of other farm groups to go instead to organizations of the Secretary's choice, through the challenged deduction for payments to the latter.

In Sec. 8c(12) of the Act of 1937 [7 U. S. C. Sec. 608c(12)], Congress itself, although expressing full cognizance that cooperatives may be engaged in "advancing the interests of the producers of such commodity," nevertheless (a) limited their representation [6] to members, stockholders and contract-patrons; and (b) did not include any price adjustments or deductions in their favor when enumerating provisions for price adjustments and deductions: Sec. 8c(5)(A) and (B). On the contrary, the Congress specified in Sec. 8c(5)(E) that deductions only for certain services could be made, and made "*except* as to producers for whom such services are being rendered by a cooperative marketing association."

We submit that the silencing of minority groups (by authorizing compulsory diversion of their financial support) was not intended by Congress here; because this is a matter of legislative rather than administrative policy, which Congress spelled out on the two occasions (above noted) when it intended to make such drastic change in the common law, while indicating to the contrary in the Act of 1937.

III

On the scope of judicial review under the Agricultural Marketing Agreement Act of 1937, we now have a conflict among the circuits: The court below held that the Secretary's conclusions that his order is "reasonably necessary to accomplish the purposes of the statute" are final when

[6] It was the unit or "collective ballot," authorized by subsection 8c(12), which permitted cooperative management to vote these payments to themselves (Vol. II, Jt. App. 448).

supported by evidence (Appendix, p. 34). But in the Second Circuit (the "home" circuit of Order No. 27, in which this question cannot arise, as shown in Part I of this petition) it is held that the Secretary's conclusions upon the effect and meaning of Order No. 27 are not final, irrespective of evidence sufficient to support the order as written: *Crowley's Milk Co.* v. *Brannan*, 198 F. (2d) 861 (C. A. 2d), at 864.[7] Certainly the Secretary's findings and conclusions should be accorded no greater finality with respect to the meaning and purposes of the Act, than with respect to the meaning and purpose of his own regulations.

Petitioners pray that a rehearing be granted.

Respectfully submitted,

HARRY POLIKOFF,
30 Pine Street,
New York 5, N. Y.,
Counsel for Petitioners.

WILLIS F. DANIELS,
Commerce Building,
Harrisburg, Pa.,
of Counsel for Petitioners.

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[7] See also *Barron Corp. Creamery* v. *Wickard*, 140 F. (2d) 485 (C. A. 7th). It was noted, *per* Minton, J., that the record lacked evidence of "fairness" on the matter specifically committed to the Secretary's discretion, i.e., "classifying milk in accordance with the form in which or the purpose for which it is used." Sec. 8c(5)(A). But in the instant case the mandate of the Act, Sec. 8c(5)(B), is "for the payment to all producers and associations of producers * * * of *uniform prices*," subject *"only"* to the specified deductions or adjustments, leaving no discretion for the Secretary to consider arguments or evidence of the fairness [or necessity] of any other deduction or adjustment; because this would violate the "not inconsistent" limitation of Sec. 8c(7)(D). Such arguments "might very properly be made to a Congressional committee," as noted by Minton, J. in 140 F. (2d) at 487. In any event, it is undisputed that the 1938 provision of Order No. 27 contains no findings as to fairness or necessity; Petition, p. 9.

Certificate of Counsel

I hereby certify that the foregoing g petition for rehearing is presented in good faith and not t for delay, and is restricted to grounds specified in Rule e 58 of the rules of this Court.

Counse HARRY POLIKOFF sel for Petitioners.